(1)

Supreme Court, U.S.
FILED

No. 971495 NOV 14 1997

OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term 1997

Gene Allen: Davenport - Petitioner

VS.

ORVILLE L. COADY - Respondent
Et. al

On Petition For Writ of Certiorari
To The Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Gene Allen: Davenport, Pro se

Gene Allen: Davenport
general delivery
Belvidere [68315]
Nebraska U.S.A.
402-768-6429

90 pp

Petitioner has been denied Due Process and his Constitutional Rights by the lower Courts, and in attempting to redress these grievances in the district court of the United States of America for the district of Nebraska, was denied Due Process, again.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals depart from the Constitution, and the Federal Rules of Civil Procedure, by upholding the Decision of the District Court to deny the Petitioner's right to Due Process of Law, by denying Petitioner's demand for a Seventh Amendment Trial by Jury?

II. Can a District Court Judge rule administratively in a case without a hearing, or without giving Petitioner a Trial by Jury as demanded, and in violation of the Federal Rules of Civil Procedure, Rule 38 (a)?

III. Are the Judges of the Court of Appeals, and District Courts required to follow their Oaths to uphold the Constitution?

IV. Are the Judges of the Court of Appeals, and District Courts required to follow the Federal Rules of Civil and Judicial Procedure, the same as Petitioner is?

V. In the Interest of Justice, are the Honorable Judges of the Supreme Court going to stop the transgressions by the Judicial System, and require this case to be heard according to the Constitution and Federal Rules of Civil and Judicial Procedure?

VI. Are the Honorable Judges of the Supreme Court going to turn their backs, and allow the Travesties of Justice to continue?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JOSEPH H. BADAMI
MICHAEL B. LUSTGARTEN
GREGORY C. DAMMAN
CRAIG A. KNICKREHM
CHARLES EDWARD LOWE
Patrick Kenner
Orville L. Coady
Albert P. Burnes
Joseph H.Murray
Gary Young
Nancy C.McLaughlin
Lloyd VanCleef

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II.
This Court should grant Certiorari to correct the departure from the accepted course of judicial proceeding, when the Court of Appeals applied or misapplied the abuse of discretion standard in reviewing the District Court's Administrative findings.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Gene Allen: Davenport, hereby petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The court will consider this appeal on the file of the United States District Court in lieu of the designated record required by Circuit Rule 30A.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this case is affirmed in accordance with the opinion of this Court.

Appellant's motion for this case to be transferred to Article III Jurisdiction is denied.

After consideration of the court, Petitioner's motion for reconsideration of the court's order of October 7, 1997 is denied.

JURISDICTION

A Writ of Certiorari was filed with the Supreme Court of the United States of America on November 14, 1997, was returned for correction on January 15, 1998, because it was done in the wrong form. Petitioner was given sixty (60) days to put in proper form.

The Order and Judgment sought to be reviewed was entered on September 25,1997, by the Eighth Circuit Court of Appeals. (Appendix 2)

A timely Petition for Review of an Administrative Action, and Transfer to Article III Jurisdiction was filed with Court of Appeals on,October 7, 1997, and was denied by the Court of Appeals on November 6, 1997. (Appendix at 3)

A timely Motion for Reconsideration was filed with Court of Appeals on October 14, 1997, and was denied by the Court of Appeals on November 6, 1997. (Appendix at 4)

The jurisdiction of this Court is invoked under 28 U.S.C. sec 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. 1343, which states:

> "the District Court shall have original Jurisdiction of any Civil Action authorized by Law to be commenced by any person".

Title 28 U. S. C. 1331, which states:

> "the District Court shall have original Jurisdiction of all Civil Actions, arising under the Constitution, Law, or Treaties of the United States".

The district court has Original Jurisdiction under Title 18 U.S.C. 3231, which states:

> "The district court of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof"

Under Title 28 U.S.C. 1391 (b) (2), venue is proper when brought in a judicial district in which a substantial part of the events or omissions, giving rise to the claim, occurred.

Plaintiff is entitled to Relief from all Defendants, pursuant to TITLE 28 U.S.C. 1343, for Knowledge of the Law, Negligence of the Law, and Failure to Stop and Correct the Wrongs.

The Petitioner demanded a Seventh Amendment Trial by Jury, on the front page of the Original Complaint, and this Seventh Amendment Right was denied by the District Court, in violation of the Federal Rules of Civil Procedure, Rule 38 (a).

The Complaint complied with F.R.C.P 8 (a) (2), by stating a "short and plain statement of the claim, showing that the pleader is entitled to relief". In very short and definitive terms, the Complaint stated that Plaintiff's GOD Given, and Constitutional Rights had been violated by each Defendant.

F.R.C.P. 8 (e) (1) states:

> "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required".

F.R.C.P. 8 (e) (2) states:

> "A party may set forth two or more statements of a claim, or defense, alternately or hypothetically, either in one count or defense, or in separate counts or defenses. When two or more statements are made in the alternative, and one of them, if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may, also, state as many separate claims or defenses as the party has, regardless of consistency .....".

In the Interest of Justice, Petitioner calls to the Court's attention, F.R.C.P. 7 (c) which states:

> "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used".

Pursuant to Title 28 U.S.C. 636, the Magistrate Judge, David Piester, had no authority to make decisions or recommendations in this case, as it was a Civil Case, and no permission was given to the Magistrate by the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution, Article III, Section 1, states:

> "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.".

The Constitution, Article III, Section 2, states:

> "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ....."

The Seventh Amendment states:

> "In Suits at common law, where the value in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law".

The Petitioner demanded a Seventh Amendment Trial by Jury, on the front page of the Original Complaint, and this Seventh Amendment Right was denied by the District Court.

STATEMENT OF THE CASE

Complaint for Constitutional Rights violations was filed with the United States District Court on November 22, 1996.

The basis for the complaint was as follows:

The explanation of this case is somewhat lengthy. Please bear

with the petitioner. In order to avoid confusion concerning abbreviations of the two banks and to avoid confusion concerning the four aircraft, petitioner will list them all separately with a brief explanation.

1. Banks
   A. Citizens State Bank, hereinafter referred to as CSB.
   B. Thayer County Bank, hereinafter referred to TCB.

2. Aircraft
   A. Cessna 180, hereinafter referred to as the 180(personal)CSB forced sale).
   B. Cessna 188, hereinafter referred to as the ag-truck (corporate) spray plane, TCB forced sale, misappropriated funds.
   C. Grumman G-164-A, main workhorse of petitioners aerial spraying business, owned for many years. TCB currently attempting to replevin (corporate).
   D. Grumman G-164-B project airplane recently purchased with intent to rebuild, TCB discontinued funding to rebuild after lending for purchase (corporate).

Petitioner was diagnosed with lung cancer in April of 1993. The relevance of which resulted in the Federal Aviation Administration refusing to renew petitioners medical certificate, which in effect disabled petitioner by prohibiting the operation of aircraft. This is not to play on the courts sympathy but to explain the precarious situation that resulted and the adverse effect it created upon petitioners Mom and Pop aerial spraying business. Since the corporations financial status was highly leveraged and backed by personal guarantees, a financial train wreck was eminent unless some serious modifications could be implemented. Although petitioner was unable to fly ultimately, there was already in the works, a very viable solution already in motion, of which petitioner will come to later in this explanation.

What came to transpire involved two banks. The first being the Citizens State Bank, hereinafter referred to as CSB, and the

Thayer County Bank, hereinafter referred to as TCB.

TCB's solution (demand) upon notification concerning the cancer diagnosis was to liquidate immediately and pay them off. Petitioner refused. During the 1993 season, petitioner avoided default by continuing to fly, since current medical certification was still valid until September of 1993. This was accomplished while chemo-therapy and radiation were being administered throughout the entire season. Needless to say, this was a very stressful and arduous season.

In the fall of 1993, TCB made the decision to discontinue funding of the G-164-B (project airplane that TCB had loaned for the purchase of). This is the very viable solution which petitioner mentioned earlier. With the project aircraft already purchased and the rebuild already started it was petitioners only hope to avoid default in the upcoming 1994 season. Because the Federal Aviation Administration's rules dictated the hiring of a pilot to replace petitioner for the 1994 spraying season, it was imperative that the wreck project be completed and sold in order to avoid default. This was all too obvious to petitioner, but TCB simply would not concede to continuing to fund the rebuild of the wreck project. In the alternative, TCB funded a new engine and propeller for the ag-truck which TCB was demanding to be sold. It should be pointed out that the ag-truck was petitioners secondary aircraft in relation to the aerial spraying operation. The sale of this aircraft would only serve to impair the operation that much more. Petitioner was not in default at this point.

Going into the 1994 season, the hired pilot wrecked the corporations main workhorse, (G-164-A) which resulted in a large repair bill and a lengthy stay in the shop for repairs. This dictated the use of the ag-truck and delayed the forced sale of the ag-truck in order to meet the needs of the corporations customers. At the end of the 1994 season, the forced sale of the ag-truck (corporate asset) was accomplished and the proceeds of that sale were inequitably applied to a personal debt by TCB. Only the proceeds of the spraying season

were applied to corporate debt, thus leaving the corporation in default and, in essence, creating a conversion problem for petitioner by Thayer County Bank.

If TCB would have either continued to fund the wreck project (G-164-B), or in the alternative, properly applied the funds generated by the forced sale of the ag-truck, the corporation would not have been in default at this point.

It should be apparent at this point that the corporation was in default as a result of the actions/inactions of TCB. Petitioner managed to avoid default in relation to CSB for the 1994 season. CSB was the lender involved in the finance of the Cessna 180 (personal). TCB chose not to initiate an action to replevin in hopes that petitioner could "catch up" in the 1995 season.

It was at this point in time that James Mckernan, Esq. Was giving legal advice to TCB inspite of the fact that he was on Retainer as Petitioner's Corporate Attorney.

In the fall of 1995, both CSB and TCB were paid in full. As of this writing neither bank has credited petitioner, returned the instruments, or given notice of dishonor in relation to those instruments. According to the Uniform Commercial Code, Petitioner is discharged and the banks have a conversion problem. By failing to adhere to general banking law and practices both Thayer County Bank and Citizen State Bank have created huge liabilities for themselves.

In the spring of 1996, CSB initiated an action to replevin petitioners privately owned aircraft (Cessna 180) even though CSB had been paid in full at the end of 1995. It is at this point that Judge Coady et al, began to commit the alleged constitutional torts associated with the suit to which this writ is relative.

Petitioner, at that time, being totally ignorant of procedure, but fully aware of his rights and who he is and is not, sought the

advice of a lawyer (Gene Oglesby). Petitioner only sought advice, not representation and made that fact clear to the lawyer. Lawyer Oglesby contacted the lawyer for CSB (Joe Murray), and the court proceeded to run over petitioner. Petitioners response (not answer) was a non-statutory abatement which very clearly explained the fact that petitioner is not a defacto fourteenth amendment citizen of the United States, but is, in the alternative, a de-jur, sovereign citizen of the Republic of Nebraska state. Judge Coady chose to ignore the non-statutory abatement and the jurisdictional issue that it should have raised, along with the request for reaffirmation of his oath of office. A request for reaffirmation of oath was also ignored by the rest of the defendants in this case. On May 26 of 1996, Judge Coady issued an order for the delivery of the Cessna 180 to CSB. In the alternative, the aircraft was sold by petitioner under threat, duress and coercion with the proceeds of the sale handed over to CSB. CSB collected yet another time for the alleged debt against this airplane.

As a result of CSB and the CSB lawyer, petitioner was severely damaged financially. CSB agreed in writing, to dismiss their petition as of the 20th day of May, 1996 at 10:30 a.m. The attorney for CSB (Joe Murray) waited 10 days to file the motion for dismissal into the court. During that 10 day period, TCB cross petitioned to replevin the G-164-A (corporate) and the related spraying equipment. Petitioners response (not answer) to the TCB summons was notice to the court, by special appearance, of the Federal Rules of Civil Procedure 9(b) (proper parties) discrepancy resulting in lack of personam jurisdiction.

The Courts response was the usual, the jurisdiction issue was ignored and Judge Coady promptly issued an order to hold all property unimpaired and unencumbered. Judge Coady also ordered a show cause hearing on June fifth of 1996. At the show cause hearing, petitioner again appeared by special appearance which was overruled/denied by Judge Coady. Petitioner again challenged the courts' jurisdiction and very carefully explained to Judge Coady that petitioner's name is Gene Allen: Davenport and not GENE A.

DAVENPORT. Petitioner again raised the issue of Judge Coadys promise to uphold the constitution, contained in his oath of office and pointed out that if he strayed from that oath, he would be doing so at his own peril.. At this show cause hearing TCB could only produce one original of several alleged notes that TCB alleges petitioners to owe. **At this show cause hearing Judge Coady told the TCB and their lawyer that before they could proceed, they must produce the remainder of the original notes.** (Emphasis added)

It was at this point that petitioner filed suit against Judge Coady for the constitutional torts in Federal Court.

Fearing a default judgment, petitioner then answered the TCB summons and demanded a trial by jury (not a jury trial) and noticed the court of petitioners right to counter claim. Petitioner believes TCB to be incapable of producing the remainder of the original notes and made request for discovery but was ignored by TCB. Petitioner then entered, into the record, a motion for discovery which, as usual, was ignored by the court. Petitioner then filed, into the record, a memoranda to get the court to compel discovery.

On February 26, 1996, Judge Coady issued an order for the TCB lawyer to have a letter in the mail by the fourteenth of March outlining discovery. In that order, Judge Coady stated that if petitioner refused discovery, there would be a hearing on April the second. The letter from the TCB lawyer arrived on the 18th, postmarked the 17th, with the letter dated the 14th. The mailing included a notary's subpoena duces tecum dated the 17th by the notary. A review of the above dates leads petitioner to believe the TCB lawyer to be in default of Judge Coady's order, if not in contempt, and it appears to be an obvious effort to deceive the court. Petitioner's response was to motion the court for dismissal of the TCB case due to the TCB lawyer's default concerning the court ordered letter.

The TCB lawyers letter outlined discovery and deposition for the third of April and Judge Coady had set a tentative hearing

concerning that discovery for the second of April. Petitioner considered the documents which the TCB lawyer demanded to see in the notary's subpoena duces tecum, to be irrelevant to an action in replevin.

At the hearing regarding discovery, to which the TCB and TCB lawyer failed to appear, Judge Coady denied the motion to dismiss over the TCB lawyer's letter being late. TCB's lawyer failed to make record of an objection to the motion. Judge Coady refused to discuss the relevance of the documents that the TCB lawyer was demanding to see in discovery. Judge Coady told Petitioner that Petitioner did not know what was and was not relevant. Judge Coady told Petitioner to go home and study more.

The court reporter reversed the statement in the transcript with regard to going home to study and as witnesses will testify to, added a statement by Judge Coady that was not said. Judge Coady repeatedly kept bringing up petitioner's suit against the judge in federal court by petitioner to which petitioner refused to comment or discuss in any way. It was obvious that Judge Coady's mind was not on what was going on in his court room which the transcript of that hearing will clearly show. Petitioner demanded that Judge Coady recuse himself from the case because Judge Coady is obviously biased against Petitioner relative to the suit against him in the federal court by petitioner. Judge Coady refused to recuse himself so petitioner noticed the court of petitioners intent to appeal Judge Coadys' decisions relative to that hearing.

At the conclusion of that hearing Judge Coady said, on the record, that the TCB lawyer (who was not present) would make the appropriate journal entries. Judge Coady, also, made note of the TCB lawyers' making the journal entry in the Judges minutes. It should be obvious, due to the circumstances, that Judge Coady is attempting to make the record indicate that the TCB lawyer was at that hearing. Neither the TCB lawyer or TCB was present at that hearing which the transcript, and witnesses will prove.

The appeal was made by Petitioner and denied by the Nebraska Court of Appeals. No reason was given for denial. The district court failed to produce the bill of exceptions as ordered by the appeals court and a Motion for Default Judgment was denied by the court of appeals.

Currently petitioner is pursuing a dismissal in the TCB case predicated on the TCB lawyer and TCB failing to show up for the aforementioned hearing. Petitioner believes failure to appear to be a Stare decisis issue and that in the legal sense Judge Coady should have great difficulty in abrogating the issue for the TCB lawyer again. If petitioner gets run over by Judge Coady on this issue, petitioner will pursue the appeals process vigorously.

As of this writing (February 25,1998) the TCB lawyers time has passed to enter an objection to petitioners motion to dismiss into the record. Petitioner will enter into the record a memorandum to compel the court to rule on the motion to dismiss.

Below is a summation of the obstacles that stand in the way for TCB which may explain the TCB lawyer's reluctance to move the TCB case forward and Judge Coady's obvious collusion with the TCB lawyer in their effort to abrogate the record. It is petitioners belief that both CSB and TCB are in a very precarious position and that the result is huge liabilities on the part of both banks, Judge Coady, and the banks lawyers.

1. First and foremost TCB has been paid and still maintains an action in replevin which is fast approaching two years.

2. TCB must produce the original notes as per Judge Coady's stipulation.

3. The fact that TCB has been paid and is still maintaining an action in replevin against petitioner going on two years after the suits inception. What do ledger entries show?

4. TCB has, on file in the Thayer County Recorders Office, an invalid deed of trust.

5. In the nearly 20 years that petitioner has banked at the TCB, neither Petitioner nor his wife have ever signed any document in the presence of a TCB notary. In spite of this fact, there are several documents that bear a TCB notary's signature and seal. Several TCB customers indicate and will testify to the fact that it is TCB custom and policy to notarize outside of customers presence.

6. Some of the most recently obtained copies of alleged loan contracts only contain the alleged signature of the borrowers. These are unilateral contracts and are unenforceable.

7. As per copies of the most recent alleged contracts, there has never been a notice of default and an opportunity to cure as per the alleged contract.

8. TCB has only returned a few of the original notes to petitioner that were paid off over the past 20 years. A good faith request has been made for the return of those notes but was ignored by TCB. This raises additional questions as to the status of those notes on the TCB books currently.

9. The misapplication of the proceeds from the forced sale of the ag-truck (corporate asset) to a personal loan resulted in the acceleration of the default of a corporate loan. This misapplication of proceeds has also resulted in a conversion on the part of petitioner.

10. There are several lender liabilities, the most serious being:

A. TCB terminated credit before petitioner was in default.

B. TCB has induced duress by threatening (in writing) to sell petitioners notes and security package to a competitor.

C. TCB has incurred a fiduciary responsibility as a result

> of a 20 year banking relationship, in that petitioner constantly and completely relied on TCB for financial advice.

Taking into consideration the above mentioned liabilities, TCB has breached the incurred fiduciary responsibility.

TCB's action to replevin is fast approaching two years since its inception and the TCB lawyer seems disinclined to move the case forward. This fact has served to induce stress and duress upon petitioner, petitioners business, and petitioners family, all while petitioner is fighting a stress related disease.

In summation-Petitioners case against Judge Coady et al. In the United States District Court for the District of Nebraska was dismissed by Judge Richard G. Kopf on the recommendation of Magistrate Judge Piester in violation of to 28 U.S.C. 636 (b)(1). The memorandum by Judge Kopf stated "In as much as Judge Piester has fully, carefully, and correctly applied the law, I need only state that Judge Piester's Recommendation should be adopted."

Judge Kopf and Magistrate Piester have repeatedly referred to the Nebraska Local Rules which are contrary to United States District Judge Warren K. Urbom's Ruling in Case No. CV 96-3357 dated October 9th, 1996, in which Judge Urbom ordered "all parties are given notice that this case shall be governed by the Federal Rules of Civil Procedure, not the Local Rules on pro se complaints."

Magistrate Judge, David L. Piester, cites the authority for his review as being a referral from District Judge, Richard G. Kopf and 28 U.S.C. 636 (b)(1)(A)(B). Plaintiff was never requested to give consent under 28 U.S.C. 636, nor did plaintiff ever give consent. Title 28 U.S.C. 636 (c)(1), states as follows: "Upon consent of the parties, a full-time Magistrate Judge . . . . . may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of Judgment in the case . . . . . ."

As per 28 U.S.C. 636 (b)(1)(A) "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion . . . . . .for judgment on the pleadings, for summary judgment, ... to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

Petitioner believes that the findings in the review by Magistrate Judge, David L. Piester, are a violation of Federal Rules of Civil Procedure 56 (g), as the findings appear to be solely for the purpose of delaying the action and not for lack of knowledge of the Federal Rules of Civil Procedure, on the Magistrates part.

In the Interest of Justice, Petitioner calls to the Court's attention, Federal Rules of Civil Procedure 7(c) which states: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."

REASONS FOR GRANTING THE WRIT

I. This court should grant certiorari to re-affirm that the judges of the court of appeals, and district court are required to follow the federal rules of civil and judicial procedure, and their oaths of office.

When a Motion for Summary Judgment is supported as provided for in F.R.C.P. Rule 56 (e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party,".

This case is based on the Principle and Foundation established by the Constitution, and reaffirmed in the case of Marbury vs

Madison, which states: "The district court of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof"

"The general rule in appraising the sufficiency of a complaint ---unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. CONLEY VS. GIBSON, 1957, 355 U.S. 41, 45, 46, 78, S. Ct. 99,102, 2 LEd 2d 80: SEYMOUR VS. UNION NEWS COMPANY, 7 cir., 1954,217 F. 2d 168.

"A complaint may not be dismissed, on motion, if it states some sort of claim, baseless though it may eventually prove to be, and inartistically as the complaint may be drawn. Therefore, under our rules, the plaintiff's allegation that he is suing in "criminal libel", should not be literally construed. The complaint is hard to understand, but this, with nothing more, should not bring about a dismissal of the complaint, particularly is this true, where a defendant is not represented by counsel, and in view of Rule 8 (f) of the Rules of Civil Procedure, 28 U.S.C., which requires that all pleadings shall be construed, as to do substantial justice. BART VS. CITY OF NEW YORK, 2 Cir., 1946, . Accordingly, the complaint will not be dismissed for insufficiency."

"A complaint will not be dismissed for failure to state a claim, even though inartistically drawn and lacking in allegations of essential facts, it cannot be said that under no circumstances will the party be able to recover."JOHN EDWARDCROCKARD VS. PUBLISHERS, SATURDAY EVENING POST MAGAZINE OF PHILADELPHIA, PA (1956) Fr Serv 29, 19 F.R.D. 511, DCED Pa 19 1958.

I. This Court should grant Certiorari to re-affirm that the Judges of the Court of Appeals, and District Courts are required to follow the Federal Rules of Civil and Judicial Procedure, and their Oaths of Office.

II. This Court should grant Certiorari to correct the departure from the accepted course of judicial proceeding, when the Court of Appeals applied or misapplied the abuse of discretion standard in reviewing the District Court's administrative findings.

AFFIDAVIT OF FACT

The following are discrepancies encountered by petitioner on the part of the various courts:

1. In the Nebraska District Court (Judge Coady)

A. Total refusal by the court to address both personam and subject matter jurisdictional issues which were raised by petitioner.

B. Refusal to address two defaults by petitioners adversary.

C. Court reporter not making correct record of what was said in court proved by failure to certify the transcript.

D. Default on the part of the District Court by failing to forward Bill of Exceptions to the Nebraska Court of Appeals.

2. In the Nebraska Court of Appeals

A. Refusing to rule the District Court of Nebraska in default for failure to forward the Bill of Exceptions to the Nebraska Court of Appeals.

B. Denial of the appeal with no reason given.

3. In the United States District Court for the district of Nebraska.

A. Dismissal of petitioner suit for reasons cited relevant to local rules by Magistrate Piester which are not relevant to pro-se litigants.

4. In the Eighth Circuit Court of Appeals.

A. Refusal to uphold petitioners right to Seventh Amendment trial by jury as demanded in the original complaint.

B. Upholding Magistrate Piesters review and recommendation to Judge Kopf to dismiss based on the local rules which are not relative to pro se litigants.

C. Judge Kopfs referral to Magistrate Pfiester to review petitioners complaint and make recommendation.

I, Gene Allen:Davenport, declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Gene Allen: Davenport, Private Citizen

Notary

Subscribed and Sworn to before me this 25 th day of February, 1998.

by Corwin Powell

My commission expires 5-4-98

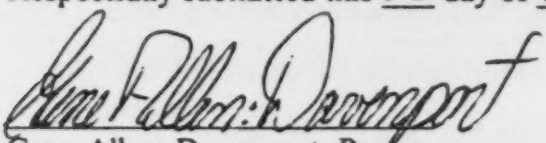
GENERAL NOTARY-State of Nebraska
CORWIN POWELL
My Comm. Exp. May 4, 1998

CONCLUSION

This period of time defies definition for the stress of mind, body, and soul, Petitioner's family had to endure.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 25 day of February, 1998



Gene Allen: Davenport, Pro se

APPENDIX

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL BRIEFING SCHEDULE ORDER

Appeal No. 97-2295 Gene Allen Davenport v. Orville L. Coady

Date: May 14, 1997

The court will consider this appeal on the file of the United States District Court in lieu of the designated record required by Circuit Rule 30A.

FILING DATES:

NOTE: These dates may be advanced or extended by court order or a party's early or late filing of a brief. Please refer to FRAP 31 (a).

Brief Appellant: **6/23/97**

Brief Appellee: **7/23/97**

Reply Brief: **8/6/97**

ALL BRIEFS AND APPENDICES SHOULD BE FILED WITH THE ST. LOUIS OFFICE

Unpublished

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2295

Gene Allen Davenport

v. 4:97-cv-3001

Orville L. Coady, District Judge for the State of Nebraska, Thayer County Courthouse; John Does; Arthur P. Burnes, Attorney; Joseph Murray, Attorney; Gary R. Young, Thayer County Sheriff; Nancy C. McLaughlin, Patrick Kenner, CEO, Thayer County Bank; Lloyd VanCleef, CEO, Citizens State Bank

Appeal from the United States District Court for the District of Nebraska

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 25, 1997

A true copy.

ATTEST: /s/_____
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Gene Allen Davenport

v. No. 97-2295NEL

Orville L. Coady, etc., et al.

Appeal from the United States District Court for the District of Nebraska

Appellant's motion for this case to be transferred to Article III Jurisdiction is denied.

October 7, 1997

Order Entered Under Rule 27B(a):

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Gene Allen Davenport

v. No. 97-2295NEL

Orville L. Coady, etc., et al

Appeal from the United States District Court for the District of Nebraska

After consideration of the court petitioner's motion for reconsideration of the court's order of October 7, 1997 is denied.

November 6, 1997

Order Entered at the Direction of the Court:
/s/ _____
Clerk, U.S. Court of Appeals, Eighth Circuit

Unpublished

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GENE ALLEN DAVENPORT

vs. 4:CV97-3001

ORVILLE L. COADY, et al.

MEMORANDUM AND ORDER

This matter is before the Court on the Magistrate Judge's Memorandum, Order and Recommendation (filing 27) and the objection to such Memorandum, Order, and Recommendation (filing 28), filed as allowed by 28 U.S.C. 636 (b) (1) and NELR 72.4.

I have conducted, pursuant to 28 U.S.C. 636 (b) (1) and NELR 72.4, a de novo review of the portions of the Recommendation to which objections have been made. Inasmuch as Judge Piester has fully, carefully, and correctly applied the law, I need only state that Judge Piester's Recommendation should be adopted.

IT IS ORDERED:

1. The Magistrate Judge's Memorandum, Order and Recommendation (filing 27) is adopted;
2. The objections of the plaintiff (filing 28) are denied;
3. The defendants' motions to dismiss (filings 9, 16, 17, 20, 23) are granted;
4. The motion for Rule 11 sanctions filed by defendants Young and McLaughlin (filing 21) is denied;
5. The plaintiff's motions for summary judgment (filings 19, 24, 25) are denied as moot, as the defendants have been dismissed from this action pursuant to paragraph (3), above; and
6. Plaintiff's complaint is dismissed, and judgment shall be entered by separate document.

DATED this 29th day of April, 1997

BY THE COURT
/s/_____
Richard G. Kopf
United States District Judge

Unpublished

IN THE DISTRICT COURT OF THAYER COUNTY NEBRASKA

CITIZENS STATE BANK, A Nebraska Banking Corporation

VS. No. 13845

GENE A. DAVENPORT and ELAINE B. DAVENPORT, Husband and Wife, and THAYER COUNTY BANK, A Nebraska Banking Corporation

TEMPORARY ORDER

TO GENE A. DAVENPORT and ELAINE B. DAVENPORT, Husband and Wife, DEFENDANTS:

You are hereby ordered to hold the following described personal property :

One Cessna 180 Airplane, Serial No. 31605, FAA Registration No. 4707B, together with all substitutions and replacements for and products of such aircraft, and together with proceeds from such aircraft, and all improvements, accessions, additions to, accessories, attachments, parts and repairs attached or affixed to or used in connection with such aircraft in your possession, unimpaired and unencumbered, in all respects, and in the same state and condition as such property may be at the time of your receipt of this order, until further order of the Court.

You are notified that if you fail to comply with this order, you shall be subject to the full contempt powers of this Court.
DATED this 9th day of February, 1996.
BY THE COURT
/s/_____
Orville L. Coady,District Judge
superior court, Thayer county, Nebraska state

Gene Allen, Davenport, sui juris
Elaine Blanche, Davenport, alieni juris

vs. Case No. 356

ORVILLE L. COADY, DISTRICT JUDGE; and NANCY C. MCLAUGHLIN, CLERK OF THE DISTRICT COURT; THE DISTRICT COURT, COUNTY OF THAYER, STATE OF NEBRASKA, Hebron, Nebraska state; CITIZENS STATE BANK, A NEBRASKA BANKING CORPORATION; LLOYD E. VAN CLEEF; MICHAEL VAN CLEEF; GERMER, MURRAY & JOHNSON, MICHAEL H. MURRAY, ESQ.; THAYER COUNTY BANK, PAT KENNER; JAMES McKERNAN, ESQ.

NON-STATUTORY ABATEMENT

Filed: February 20, 1996

Non-Statutory Abatement

By Gene Allen, Davenport, sui juris; Elaine Blanche, Davenport, alieni juris

In the matter of : SUMMONS DOC 23, PAGE 155 CASE NO. 13845;; PETITION DOC 23, PAGE 155 CASE NO. 13845; PROMISSORY NOTE--EXHIBIT "A" SECURITY AGREEMENT-- EXHIBIT "B"; FINANCING STATEMENT--EXHIBIT "C", SECURITY AGREEMENT-- EXHIBIT "D"; SUBORDINATION AGREEMENT--EXHIBIT "E"; REQUEST FOR DELIVERY DOC 23, PAGE 155 CASE NO. 13845; TEMPORARY ORDER DOC 23, PAGE 155 CASE NO. 13845; NOTICE OF HEARING DOC 23, PAGE 155 CASE NO. 13845.

To All and Sundry Whom These Presents Do or May Concern:

INTRODUCTION

This is a non-statutory abatement issued pursuant to common law rules applicable to such cases, against the Defendant, ORVILLE L. COADY, DISTRICT JUDGE; and, Co-Defendants NANCY C. McLAUGHLIN, CLERK OF THE DISTRICT COURT; THE DISTRICT COURT, COUNTY OF THAYER, STATE OF NEBRASKA, Hebron, Nebraska state; CITIZENS STATE BANK, A NEBRASKA BANKING CORPORATION; LLOYD E. VAN CLEEF; Michael VAN CLEEF; GERMER, MURRAY & JOHNSON, MICHAEL H. MURRAY, ESQ.THAYER COUNTY BANK, PAT KENNER; JAMES McKERNAN, ESQ. all, acting as Foreign Enemy agents of a statutorily created, foreign de facto corporation. Said agents are imposing provisions of a contract counter to public morals, in the Nature of a Praemunire, and as belligerents are in violation of International Law and The Law of Nations.

Part One of this matter shall be known as Non-Statutory Abatement and contains the following documents, titled: I. Non-Statutory Abatement; find II. Verification.

Chapter One
Return of Papers and Averments

Please find enclosed the following returned papers:

SUMMONS DOC 23, PAGE 155 CASE NO. 13845; PETITION DOC 23, PAGE 155 CASE NO. 13845; PROMISSORY NOTE -- EXHIBIT "A"; SECURITY AGREEMENT -- EXHIBIT "B"; FINANCING STATEMENT -- EXHIBIT "C"; SECURITY AGREEMENT -- EXHIBIT "D"; SUBORDINATION AGREEMENT -EXHIBIT "E"; REQUEST FOR DELIVERY DOC 23, PAGE 155 CASE NO. 13845; TEMPORARY ORDER DOC 23, PAGE 155 CASE NO. 13845; NOTICE OF HEARING DOC 23, PAGE 155 CASE NO. 13845;

These papers are refused for cause without dishonor and without recourse to Us, and are returned, *in a timely manner and in Good*

Faith, herewith, because they are irregular and unauthorized, based upon the following, to wit:

Comes Now, a private Christians, grateful to Almighty God for Our Liberty, and humbly Extend Greetings and Salutations to you from, Christ, the Messiah, and Ourselves by *Visitation,* to exercise Ministerial Powers in this Matter, to return your papers which were received, but not accepted.

Returned papers contain the following Marks of Fraud:

First:
Mark: Your papers do not have upon their face Our full Christian Appellation in upper and lower case letters, nor do the additions in the compilation upon the items, herewith returned, apply to Us; and,

Second:
Mark: Your papers allege violations of law, foreign to Our Venue, which, no Oath, Promise, or Law attaches to Us thereto; and,

Third:
Mark: Your papers fail to disclose any legal connection between Ourselves and your company; and,

Fourth:
Mark: Your papers have no foundation in Law; for the reason, they are not from an office recognized by the People or General Laws of **Nebraska; and,**

Fifth:
Mark: Your papers lack jurisdictional facts necessary to place Us within your venue; and,

Sixth:
Mark: Your papers are unintelligible to Us; based upon the following: They are not written in Proper English; being such, they fail to appraise Us of the Nature of any matter alleged, if in fact your allegations have any foundations; and,

Seventh:
Mark: Your papers fail to affirmatively show, upon their face, lawful authority for your presence in Our Venue or entry upon Our

Land; and,

Eighth:

Mark: Your papers fail to show, upon their face, the necessity for your entry upon Our Privacy; and,

Ninth:

Mark: Your papers fail to affirmatively show, upon their face, your authority to violate or disparage Us in any way; and,

Tenth:

Mark: Your papers have no Warrant in Law and are not Judicial in Nature; and,

Eleventh:

Mark: Your papers are not sealed with authority recognized in **Nebraska;** and,

Twelfth:

Mark: Your papers fail to disclose any legal connection between Ourselves and your office; and,

Thirteenth:

Mark: Your papers are. incomplete and defective, upon their face, due to insufficient Law; and,

Fourteenth:

Mark: Your papers are incomplete and defective, upon their face, for the reason: they are not signed as being true and accurate; and,

Fifteenth:

Mark: Your papers are incomplete and defective, upon their face, for the reason: they show no nexus between Ourselves and the corporation, decedent or the nom de gurre, or misnomered one shown on the face of the papers.

Sixteenth:

Mark: Lastly, the. original Thirteenth Amendment to the Constitution for these united States of America clearly and strictly **forbids** *Titles of Nobility and Honour* to be taken by any Citizen of these united States of the American union. Woe be unto any lawyer, counselor of the law, counselor to the law, judge, magistrate or justice of the peace who is a member of any association or "bar", whose membership is constructed to hold power and/or force over the common and sovereign

people of this country. For to do so forfeits their citizenship on this great land and makes them culpable to a host of liabilities, among them **treason**. To proceed against this Non-Statutory Abatement in any venue other than the American common law is to proceed at one's own peril and risk! May Almighty God have mercy upon those who embark on such a journey of foolhardiness and danger!

Now, Therefore:

We are returning all of your papers, and shall exercise Our Right of Avoidance, for the reason: they are incomplete, defective, irregular, misnomered and unauthorized.

Chapter Two
Discussion
Firstly:

Whereas, pursuant to constitutional due process requirements and the General Laws of **Nebraska**, said Foreign Enemy agents are not State Judicial Officers having power to issue orders or judgments of any kind; and,

Whereas, returned papers concerning an unlawfully imposed contract, imposes upon Our Right of Privacy; and,

Whereas, Our Privacy is a Constitutionally secured Right; and,

Whereas, Our Rights, as recognized and so stated by our forefathers in the Declaration of Independence, are Unalienable; and, Therefore, returned papers concerning an unlawfully imposed contract are harassment and a public nuisance.

Secondly:

Whereas, said Foreign Enemy agents are attempting to use a form of money which is inimical to public welfare, according to the standards set by the Constitution for these united States of America of 1789; and,

Whereas, due to your insolvency, as exampled by your debt credit, created out of. thin air, and evidenced by your bookkeeping entries; and,

Whereas, no lawful dollars actually changed hands, and all contracts do not utilize or state dollars as being used or being loaned; and,

Whereas, no lawful money of these united States of America was actually loaned, only created credit was extended; and,

Whereas, loans of credit as indicated by your bookkeeping entries are unlawful in these united States of America, and **Nebraska;** and,

Whereas, the Federal Reserve is a private corporation issuing and using private script,
which is usurious, and is Judaismus by nature, and is counter to Law and the Public Welfare; and,

Whereas, the use of the word dollar is inimical to the Standard Unit of Value has been eradicated by Congress; and,

Whereas, your contracts depict no symbol that would indicate what the numbers intended and the use of a single line "S" depicted by your papers as such species and kind is now being utilized by many other countries; and,

Whereas, CITIZENS STATE BANK, A NEBRASKA BANKING CORPORATION, has not and cannot demand any species of kind that is not in existing circulation; and,
Whereas, your actions by your contract and the use of created debt credit creates a Negative Pregnant; and,

Therefore, the threatened unlawfully imposed contract is **contra bono mores;** and the facts attested herein are ultimate facts absent any evidence to the contrary and there exists no evidence to the contrary. Hence, any order issued by the THE DISTRICT COURT, COUNTY OF THAYER, STATE OF NEBRASKA, Hebron,

Nebraska state; against Demandant or his/hers property is **VOID**.

Thirdly:

Whereas, returned papers, contain the extraneous numbers February 9, 1996, November 12, 1992, May 31, 1995, February 15, 1996, October 17, 1995, 8 day of February, 1996, December 30, 1993, etc. which terminology, to Us, is confusing: for the reason that, We reckon time in years of Our Christ, the Messiah;
and,

Whereas, conflicting provisions of the peoples moral law forbids Us use of said foreign way of reckoning time; and,

Whereas, returned papers contain scandalous matters all to Us detriment and harm.

Now, Therefore:

We are returning all of your papers, and shall, henceforth, exercise Our Right of Avoidance; for the reason: they are irregular, unauthorized, misnomered, defective upon their face and utterly void, and are, herewith abated as a public nuisance. There appears to be no factors which would warrant adjustment to this Abatement, due to a Conflict of law.

Chapter Three:

Ordering Clauses:

Pursuant to the Constitution of these united States of America of 1789, at Article IV, Section one and two, clause one, and the following American Maxim of Law and the General Laws of **Nebraska**, are binding in all states of the American Union; wherein it does say, that:

Section one. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

Section two. "The Citizens of each State shall be entitled to all

Privileges and Immunities of Citizens in the several States."

In accordance with Article VII of the Bill of Rights to the Constitution for these united States of America; wherein it does say, that:

" In suits at common law, where the value in controversy shall exceed twenty dollars, the right by trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law,"

Take Notice Therefore, We are now making public Our notice that We will only accept the jurisdiction and venue of a properly constituted common law court convened in **Our** county, and with a jury of **Our** peers seated to hear **Our** case, and only after proper service is presented to Us by the Thayer county Sheriff's Office, by an officer with delegated authority in the common law venue by the Nebraska Constitution; and,"

Said, Defendant, shall abate the matter of returned papers, or file a written response, within thirty (30) days of the release of this Non-Statutory Abatement showing why the abatement should not be imposed. Any and all responses shall be written and must include with specificity and detailed factual statements, all signed and Asserved, or signed under Oath, or signed under Penalty of Perjury, along with any and all supporting documentation.
Failure to respond in the time and exact manner as prescribed, herein, will result in an immediate Default and Default Judgment and subject defendant(s) to Civil and /or Criminal liabilities pursuant to International Law and The Law of Nations.

If any legal actions or processes are filed, initiated or commenced in any court, hearing or tribunal by Defendants,
A. Prior to completely answering and/or responding directly and fully to this Abatement, OR
B. Within thirty (30) days from filing this Abatement. OR
C. Using any other means to not fully answer and/or respond directly

and/or to circumvent this Abatement,
then it shall be deemed an immediate default and require the Defendant to pay immediately to Demandant a penalty sum in the amount of one million Silver dollars in U.S. currency and /or be subject to Criminal penalty(s) and liabilities in addition.

All remittances in this instant matter should be marked with the Sheriff's Case Number, or Case Number and shall be mailed directly to the following location;

Gene Allen, Davenport, sui juris
General Delivery
Belvidere Main Post Office
Belvidere, Nebraska

Wherefore:

Until this Conflict of Law is resolved, We wish you to do the following, to wit;

First:
Obtain process issued, under seal, from a Court appertaining to a **Nebraska** Judicial Department; and,

Second:
That said process be based upon a sworn Oath or Affirmation from a competent Witness or Damaged Victim; and,
Third:
That said process bear Our full Christian Appellation in upper and lower case letters, and in the addition, thereto, sui juris or alieni juris, and, must be handled and personally served upon Us by the Thayer county Sheriff

There is no need for Us to communicate until process is legally served.

We private Christians, will thenceforth, maintain Our Right of Privacy

and exercise Our Right of Avoidance and stated upon the grounds set forth above.

Note: The facts attested to herein are ultimate facts, absent any evidence to the contrary, and there exists no evidence to the contrary. This instrument is intended in Good Faith to protect, secure and defend the Rights, Immunities and Property of Demandant and will serve as prima facie evidence in any future court actions initiated by Demandant or Defendant.

Demandant verifies that all statements contained herein are true and correct to the best of Demandant knowledge and Christian conviction, and upon information.

Prayer
Our Heavenly Father, Creator, and God of Abraham, Isaac and Jacob...

We come before You, knowing the blood shed by Our Savior, Jesus the Christ, the Messiah, who died for our sins and for the sins of this world....

And that the Power of the Holy Spirit, the Holy Ghost sent to provide comfort to Us...
We humbly acknowledge, this Holy Trinity, and pray that You will allow no evil into Our environment, or that of Our Family, or of Our friends, or those who We love. Please, Forgive Us, Father, for Our sins, in both Your sight and the sight of Man. We repent Our sins and pray that by the Messiah, Christ, and the Holy Spirit, We are forgiven. We ask, Father, that you forgive those who intrude on Our Privacy, at trespass on Our Faith in You and Your Word: for they know not what they do - in risking eternal damnation by raising your anger and incurring your terrible Wrath which consequently follows.

All these things We pray for -- in the Holy Names of the Father, the Son, and the Holy Spirit. Amen!
Sealed by my voluntary act of Our own hand this eighteenth day of

the **second** month in the year of Our Lord and Savior Christ, the Messiah, nineteen-hundred and ninety-six, Anno Doinini, in the two-hundred and twentieth year of the Declaration of Independence of America.

We have the Honor of Being Private Christian

(seal) /s/_____, sui juris

(Seal)/s/_____, alieni juris

Attachments: Original papers of:

SUMMONS DOC 23, PAGE 155 CASE NO. 13845;; PETITION DOC 23, PAGE 155 CASE NO. 13845; PROMISSORY NOTE -. EXHIBIT "A"; SECURITY AGREEMENT -- EXHIBIT "B"; FINANCING STATEMENT -- EXHIBIT "C"; SECURITY AGREEMENT -- EXHIBIT "D"; SUBORDINATION AGREEMENT -EXHIBIT "E"; REQUEST FOR DELIVERY DOC 23, PAGE 155 CASE NO. 13945; TEMPORARY ORDER DOC 23, PAGE 155 CASE NO. 13845; NOTICE OF HEARING DOC 23, PAGE 155 CASE NO. 13845.

II. Verification by Asseveration

In witness, knowing the Law of bearing false witness before Almighty God and Men, We solemnly aver, that We have read the annexed Non-Statutory Abatement and We know the contents thereof; that the same is true of Our own knowledge, except to the matters which are therein stated on Our information and belief, and as to those matters , We believe them to be true.

Sealed by the voluntary act of Our hand on this the twenty-seventh day of the twelfth month of the year of Our Lord and Savior Christ, the Messiah, nineteen hundred and ninety-five, and the two hundred and nineteenth year of the Declaration of Independence of America.

/s/_____, sui juris

/s/_____, alieni juris

Unpublished

IN THE DISTRICT COURT COUNTY OF THAYER
STATE OF NEBRASKA

CITIZENS STATE BANK, A NEBRASKA BANKING CORP.

v Case No. 13845

Gene Allen, Davenport, et al., Elaine Blanche, Davenport, THAYER COUNTY BANK, A NEBRASKA BANKING CORPORATION

Notice of Intent

Comes Now, Gene Allen, Davenport, and Elaine Blanche, Davenport, *in a timely manner and in Good Faith,* by visitation, in propria persona, to inform the Court that the response to the Summons for Case No. 13845 is the Non-Statutory Abatements which were delivered to you bearing Sheriffs' case numbers 355 & 356 dated this twentieth day of the second month in the year of Our Lord and Savior Jesus, the Christ, nineteen-hundred and ninety-six.

/s/_____ /s/_____
Elaine Blanche, Davenport Gene Allen, Davenport
%General Delivery
Belvidere Main Post Office
Belvidere, Nebraska state

I do hereby certify that a copy of the foregoing was mailed to all parties of record on this the twentieth day of the second month in the year of Our Lord and Savior Jesus, the Christ, nineteen-hundred and ninety-six.

By /s/_____

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA
CITIZENS STATE BANK, A Nebraska Banking Corporation

vs. No. 13845

GENE A. DAVENPORT and ELAINE B. DAVENPORT, Husband and Wife, and THAYER COUNTY BANK, A Nebraska Banking Corporation

ORDER

Filed: March 13, 1996

This matter came on for hearing on the 13th day of March, 1996, at 9:00 o'clock a.m., on the plaintiff's request for delivery of the following described property:

One Cessna 180 Airplane, Serial No. 31605, FAA Registration No. 4707B, together with all substitutions and replacements for and products of such aircraft, and together with proceeds from such aircraft, and all improvements, accessions, additions to, accessories, attachments, parts and repairs attached or affixed to or used in connection with such aircraft.

Hearing was held, by stipulation of the parties, in the District Court of Jefferson county, Nebraska. Plaintiff appeared by its president, Michael D. VanCleef, and by counsel, Joseph H Murray. Defendants did not appear either in person or by counsel. The Court, being fully advised in the premises, finds as follows:

1. That the plaintiff has raised a bona fide issue as to whether it has a special ownership of or interest in the claimed property described above, but that it appears sufficiently probable to the court that the plaintiff will prevail on the merits; and

2. That there is a bona fide issue as to whether the claimed property, described above, is wrongfully detained by the defendants

and that the plaintiff is entitled to the immediate delivery of the property.

NOW, THEREFORE, IT IS ORDERED that the Clerk of this Court issue an order for delivery of the above-described property to the plaintiff and deliver such order to the sheriff of this county for service on the defendants and return thereof in accordance with the manner provided by law.

Dated this 13th day of March, 1996
BY THE COURT
/s/_____
Orville L. Coady
District Judge

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK

vs.

No. 13845

Gene Allen, Davenport
Elaine Blanche, Davenport

AFFIDAVIT OF TRUTH AND NOTICE OF FRAUD

Comes now your affiants Gene Allen, Davenport and Elaine Blanche, Davenport, over the age of twenty-one, competent to testify, under the flag of peace, having first hand knowledge, attesting under penalty of perjury under the laws of the United States of America.

1. Service is defective relative to the alleged address.
2. Service is defective relative to the fact that Gene Allen, Davenport and Elaine Blanche, Davenport are not the parties described therein.
3. Neither Gene Allen, Davenport nor Elaine Blanche, Davenports' signature are affixed to any of the alleged instruments included therein.
4. THAYER COUNTY BANK is not holder in due course of affiants signature.
5. This court lacks subject jurisdiction.
6. This court lacks per sonam jurisdiction.

Further affiant sayeth naught.

Submitted this 25th day of May 1996
/s/_____
Gene Allen, Davenport
/s/_____
Elaine Blanche, Davenport

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK, A Nebraska Banking Corporation

vs. No.

GENE A. DAVENPORT and ELAINE B. DAVENPORT, Husband and Wife, and THAYER COUNTY BANK, A Nebraska Banking Corporation

TEMPORARY ORDER AND NOTICE OF HEARING

Defendant Thayer County Bank in the above entitled action having filed its Cross Complaint, Affidavit, and the Court being informed in the premised FINDS and ORDERS that:

1. The Defendant Davenport Aviation Inc. Shall hold the property described in Defendant Bank's Cross Complaint and Affidavit in its possession unimpaired and unencumbered and in all respects in the same state and condition as at the time of the receipt of the Court's order until further order of the Court. Said property is described as follows, to-wit:

All of that personal property as is more particularly described on those copies of UCC Financing Statements which are attach to the affidavit in Replevin filled herein, the contents of which are incorporated herein by this reference as if set out at length.

2. If the Defendant fails to comply with this order, it shall be subject to the full contempt powers of this Court.

3. That hearing shall be held on the 5th day of June, 1996 at 2:00 o'clock p.m. in the District Courtroom of Thayer County, Nebraska, located at the Thayer County Courthouse, Hebron, Nebraska at which time the Court will determine the Cross Claimant's right to

possession of the said property pending a final determination on the merits of this case. At said hearing, Defendant shall be required to show cause why possession of the described property should not be delivered to the Thayer County Bank as Cross Complainant.

Dated this the 23rd day of May, 1996.

BY THE COURT:
/s/_____
District Judge

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK

vs. Case No. 13845

Gene Allen, Davenport
Elaine Blanche, Davenport

AFFIDAVIT OF TRUTH

Comes now your affiants Gene Allen, Davenport and Elaine Blanche, Davenport under the flag of peace competent to testify and having first hand knowledge to the following facts, true, correct, complete, not misleading, under penalty of perjury under the laws of the United States of America.

1 .Service is defective relative to the alleged address.
2. Service is defective relative to the fact that Gene Allen, Davenport and Elaine Blanche, Davenport are not the parties described therein.
3. Neither Gene Allen, Davenport nor Elaine Blanche, Davenports' signature are affixed to the alleged mortgage notes in Exhibit A.
4. Neither Gene Allen, Davenport nor Elaine Blanche, Davenports' signature are affixed to the alleged liens in Exhibit B, C, or D.
5. Neither Gene Allen, Davenport nor Elaine Blanche, Davenport have a signature affixed to any negotiable instruments, mortgage note, or lien in respect to the aircraft described in Exhibit A, B, C, or D.
6. CITIZENS STATE BANK is not holder in due course of affiants signature.
7. This court lacks subject jurisdiction.
8. This court lacks per sonam jurisdiction.

Comes now your affiants, Gene Allen, Davenport and Elaine Blanche, Davenport pursuant to federal Rules of Civil Procedure 9(b) giving this court notice of fraud.

Further affiant sayeth naught.

Submitted this 17th day of May 1996
/s/_____
/s/_____

Unpublished

Contract Settlement Agreement Relative to Case No. 13845

I Citizens State Bank, Carleton do hereby agree that Gene Allen, Davenport and Elaine Blanche, Davenport have fully tendered the debt at issue in case #13845, and that debt is hereby discharged on 20 day of the month of May 1996 at 10.:30 a.m. and do hereby agree to dismiss case # 13845 as of the above date and time.

Submitted on the 20 the day of May, 1996 at 10:30 a.m.
Citizens State Bank, Carleton, Ne. 68326
By /s/_____
CEO

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK, A Nebraska Banking Corporation

vs. Case No. 13845

Gene Allen, Davenport and Elaine Blanche, Davenport ,THAYER COUNTY BANK, A Nebraska Banking Corporation

AFFIDAVIT OF TRUTH

Comes now you affiant, Gene Allen, Davenport, over the age of twenty-one, competent to testify, under the flag of peace, having first hand knowledge, attesting under penalty of perjury under the laws of the United States of America.

Attached hereto is a copy, true, complete and correct of the instrument tendered to CITIZENS STATE BANK and the release form given in receipt of the instrument relative to the alleged debt in case no. 13845.

Submitted this 28th day of May, 1996
/s/_____

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK, A Nebraska Banking Corporation

vs. Case No. 13,845

GENE A. DAVENPORT and ELAINE B. DAVENPORT, Husband and Wife, and THAYER COUNTY BANK, A Nebraska Banking Corporation

TRANSCRIPT OF HEARING BEFORE THE HONORABLE ORVILLE L. COADY, DISTRICT JUDGE

June 24, 1996

APPEARANCES
For The Thayer County Bank: Albert P. Burnes
Attorney at Law
319 South 17 Street
Omaha, NE 68102

W. Don McIntyre, Official Court Reporter, Friend, Nebraska

(on June 24, 1996, in the district court of Thayer County, in Hebron, Nebraska, before ORVILLE L. COADY, JUDGE, with Mr. Joseph Murray appearing as counsel for the plaintiff, and the defendants not being present in person, the following proceedings were had:)
THE COURT: This is civil case, 13,845 entitled citizens State Bank versus Gene A. Davenport and Elaine Davenport, husband and wife, and Thayer County Bank, a Nebraska Banking corporation.
The file shows that the Citizens State Bank have been satisfied and there petition has been dismissed. (Emphasis added)
So therefore our parties are the Thayer County bank on its cross-petition and the defendants Gene and Elaine Davenport. Gene Davenport appears, but I am not sure I know Elaine, is she here?

All right.
There was a special appearance that was forwarded to my office --(Emphasis added)
Mr. Davenport, you understand that you have a right to bring a lawyer.
MR. DAVENPORT: Yes, sir.
THE COURT: To this hearing.
And I assume that you choose to proceed without counsel.
MR. DAVENPORT: Yes, sir.
THE COURT: All right, and --
MR. DAVENPORT: Wait judge, no, I don't choose to proceed. I am here in special appearance. (Emphasis added)
THE COURT: You may argue your special appearance.
Tell me what you want to tell me.
MR. DAVENPORT: We on the record.
THE COURT: Yes.
MR. DAVENPORT: Okay. Your Honor, I, Gene Allen Davenport am here by special and not general appearance. For the record, my Christian name is Gene Allen, with the first letters capitalized and all others in lower case, and my family name is Davenport, the first letter capitalized and all others in lower case. I am not a corporate person nor am I a Fourteenth Amendment citizen of the United States. I am a citizen of the Nebraska republic, one of the several States party to the Constitution for the United States of America, subject only to Congress' Article I legislative jurisdiction. I am a principal, not a subject, and therefore specially visit this court as a Sovereign among Sovereigns. You have taken a constitutional oath as a public servant to conduct yourself within the Constitutional framework, and I hereby bind you to that oath. You depart from it at your own peril. I have entered certain matter into this Court which defaults the court's jurisdiction over person and subject matter, and when operating in a de facto federal character, venue authority. I stand on the paper so entered, and in the absence of contrary proof entered into record, my

allegations will be construed as presumed fact. I herewith bind you to rules governing judicial notice and presumed fact, and should allegations set forth in my pleadings not be answered in record, admonish you to dismiss this case and vacate all orders contrary to my interest. Further, I sayeth not. (Emphasis added)
THE COURT: Do you have any response?
MR. BURNES: Your Honor, I don't know how to respond, I don't believe that Mr. Davenport has stated any fact or given any evidence to the court that would allow him to appear by special appearance at this time.
In this particular case, again he was served with the cross-petition and answer of Thayer County Bank.
I don't know how to respond to the statement of Mr. Davenport.
THE COURT: Well, there was proof of service by the sheriff, showing that Mr. Davenport was served personally by being handed a copy of the answer and cross-petition.
It was sit for replevin on all five causes of action?
MR. BURNES: That's correct, Your Honor. it was continued for good cause based upon a docket entry due to an illness I had.
THE COURT: **The personal appearance is overruled. How much time do you want to answer or do you want to proceed without answering further today. (Emphasis added)**
MR. DAVENPORT: I have nothing more to say, Judge.
THE COURT: All right, are you prepared to try it today.
MR. BURNES: Yes, Your Honor I am ready to go forward I mean it is my understanding that the defense has the burden of proof of going forward in a replevin action to show that there is no cause for the property to be order to be turned over to the plaintiff in the case, Thayer County Bank.
I guess I would be able, if the Court doesn't need to received any testimony, Mr. Patrick Kenner, President of Thayer County Bank states in his affidavit

that was filed, the petition and the answer and the cross-petition in this particular case filed, again with the affidavit sitting fourth the security interest that the bank had in the property. He also verified the sign-off on the answer and cross-petition which set fourth the defaults in the case and the notice that we have here. Also alleged in and attached were copies of the note and the security documents which secured the Thayer County Bank's interest in this particular case, and I guess I would ask the court to receive those into evidence if the Court doesn't need any -- to receive live testimony.

THE COURT: Well, I think that the Court rules use to be that I had to have the original documents, since the Supreme Court made new rules, I don't know if my old rules have any standing any more.

MR. BURNES: I believe the Court gives us leave to substitute those original notes. Our concern was -- I do have one of the original notes here today, if we had to go forward based upon that which I was able obtain from the SBA.

THE COURT: Well, all right, let's see, now this is a replevin case. There ordinary would be what we would call a temporary hearing?

MR. BURNES: That's correct, Your Honor, it would give -- I guess, you know, from that standpoint, that's correct, Your Honor I mean you can order possession of the property to be delivered at this point in time.

THE COURT: Alright, there being no cause shown why we shouldn't proceed with the replevin and that the bank shouldn't be entitled to seized the property, --.

MR. DAVENPORT: Excuse me, Judge, I can't hear have well, could you speak up, please.

THE COURT: Well, there's no showing that the bank doesn't have the right to proceed to take the property under its documents and instruments and **so I am going to allow the seizure of the -- of the property provided that the bank supplies the original documents.** (Emphasis added) I haven't looked them over, but they are only personal property documents.

MR. BURNES: That's correct, Your Honor, no real property

involved in this case.
THE COURT: Let me review the order one last time.
Frankly, when I used to practice in replevins, the statutes have change since those days. Let me review what my order says.
All right my order filed on May 23rd, orders the defendant, Davenport Aviation, to keep all personal property in its possession unencumbered. That a hearing would be had today at this time as amended by the Court to determine the claimant's right to possession of said property, pending a final determination on the merits of the case and at said hearing defendant shall be required to show cause why possession of the described property should not be delivered to the Thayer County Bank as cross-complainant. There's no showing of cause for not delivering the property, so I am entering a temporary order for the delivery of the property and upon request, I will sit this matter for trial as to whether the -- whether the bank actually has right to take the property and sell it, but in the meantime, they are entitled to due process of the property.
Let's see, you have to present some bond, don't you?
MR. BURNES: Normally there's surety that needs to be posted.
THE COURT: All right, the bank will put up property or put up surety which can be determine which it determines, what they need to insure that the defendant is not hurt financially or doesn't lose his property unduly. If there's nothing else, we'll proceed.
You'll make all. the forms and assist the Sheriff.
MR. BURNES: I will do so, Your Honor.
THE COURT: All right. We are adjourned.

(Hearing concluded).

Unpublished

DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK, A NEBRASKA Banking Corporation

Vs. Case No. 13845

Gene Allen, Davenport and Elaine Blanche, Davenport Husband and Wife, and THAYER COUNTY BANK, A NEBRASKA Banking Corporation

By Special Appearance

Judicial Interrogatory

Now comes Gene Allen, Davenport and Elaine Blanche, Davenport, on behalf of themselves, who are or were nationals of the United States, as defined in the Immigration and Nationality Act at 8 USC - I101 (a) (22) (B), and de jure Citizens of the Nebraska republic, entitled to all constitutional and common law rights, benefits and assurances indigenous to the Nebraska republic, inclusive of the rights to life, liberty, property, and the pursuit of happiness, which of necessity includes the right to engage in common law occupations, through whatever vehicle is convenient (business enterprise), without encumbrance by imposed adhesion contract, whether implied or actual.

The following statements are made in an affirmative form as though the judicial officer presiding in the instant matter were making them. Should the judicial officer fail to refute these statements, they will be deemed to have been confessed, and thereby will be construed as presumed fact for legal purposes. Should the Judicial officer dispute any of the statements set out herein, he will refute them with legal authorities sufficient to establish probative value to alternative allegations within a period of twenty days from receipt of this instrument.

Affirmative Interrogatory Statements

The case at hand and of immediate interest was filed under provisions of statutory law which as a body is known as the Code of Civil Procedure.

The Code of Civil Procedure is in derogation of common law indigenous to the Nebraska republic, one of the several States party to the Constitution for the united States of America.

The Code of Civil Procedure is one of the several Adopted Acts or Uniform laws incorporated in Nebraska statutes which presumes that the Nebraska republic is a federal State in the class of federal States inclusive of the District Of Columbia, Puerto Rico, Guam, the Virgin Islands, etc., rather than one of the several States party to the Constitution for the united States of America.

The presumption that Nebraska is a federal rather than one of the several States presumes that Nebraska is subject to Congress' unrestricted Article IV authority within the geographical United States, which is a separate, self-interested entity.

When operating under statutory Code law, the court presumes to have a federal or United States character.

In the framework of statutory Code law which is in derogation of common law, as modified by the constitutions for the united States of America and the Nebraska republic, the court operates under admiralty rules, the court accommodates private international law, and as such is representative of the Central Authority established by treaties on private international law effected by the United States Government.

The principals or benefactors under these treaties on private international law are The Bank (the World Bank) and The Fund (the International Monetary Fund), which are foreign entities to the

United States and the several States.

The United States Government is a corporate entity, and as such is a foreign corporation to the several States party to the Constitution for the united States of America.

When operating as a statutory or legislative Court under the adopted uniform acts, the court is a *nisi prius* or contract court rather than a true judicial court representative of the de jure body politic for the Nebraska republic.

Statutory Code law implemented by way of Adopted Acts or Uniform Laws is based on the model provided by the British judicial act of 1873.

Statutory Code law which is in derogation of common law indigenous to the Nebraska republic effectively re-states British feudal law, which is in the lineage of roman civil Law, etc., Dating to the Babylonian Empire, with the modern version of this ages-old peonage law premised on creditor-debtor relations rather than the bloodline class system (nobility vs. tile serf, servant or slave) common throughout Europe and the British Isles into the last century.

When the Court operates in the framework of statutory Code law described above, the judicial officer functions as a magistrate judge rather than in a true judicial capacity, with his role being ministerial rather than judicial.

When operating in this capacity, the Judicial officer is representative of the United States Government as nominee of the Bank and The Fund.

The judicial officer is compensated for this service by way of off-shore retirement fund trusts and other benefits.

The Constitution for the united States of America names and therefore authorizes three forms of law: Law, which is construed to

be the English heritage common law as modified by state and national constitutions, with one of the foundation precepts being that, "all men are created equal" (Declaration of Independence); equity, which is a system of law that falls within the general category of civil law devised to provide remedies where the common law is inadequate to provide remedies; and admiralty and maritime law.

Admiralty and maritime law apply to International affairs, including, contracts, and international law on the high seas. Congress carried out constitutional intent by promulgating the first United States judicial act in 1789.

The judicial act of 1789 vested courts of the United States with admiralty and maritime
jurisdiction exclusive of courts of the several States.

The Constitution of the united States of America is the law of the land for the several States.

Since courts of the United States have original cognizance of admiralty and maritime affairs, courts of the several States are competent only in common law and equity action.

In the American system of government, the people are sovereign, American founders having articulated this principle in the notion of government by consent.

Foundation law indigenous to the several States (English-lineage common law modified by state and national constitutions) is premised on the notion that man, as a being created by God, is endowed by certain unalienable rights, inclusive of but not limited to, unencumbered rights to "life, liberty and property" (Fifth Amendment, Constitution for the united States of America, and corresponding provisions in bills of rights to constitutions for the several States).

The privileged relationship between God and man provides a

framework in which God himself endows man individually (God is no respecter of men), and in this relationship, man in individually accountable to God antecedent to and without reference to government.

In the Declaration of Independence, American founders articulated what is construed as "existing law" when they justified severance from British rule premised on "the laws of Nature and Nature's God." This statement endorses the notion that man is directly and personally accountable to natural and moral law which God himself established and man has no power to author or amend.

As an underlying principle, American founders articulated that governments are instituted among men for the sole purpose of securing the unalienable rights which are inherent to each person (moral being) without reference to government.

Each person (moral being) has the right to defend life, liberty, property and other unalienable rights not articulated in the core list of three specifically cited in tile Declaration of Independence and the Fifth Amendment to the Constitution for the united States of America.

By way of state and national constitutions, the sovereign people have divested themselves of certain enumerated powers, thereby establishing republican forms of government which have only constitutionally enumerated powers.

In the American system, government cannot legitimately exercise powers not enumerated in their respective constitutions.

Where the United States is concerned, authority and exercise of power are specifically limited by Ninth, Tenth and Eleventh Amendments to the constitution for the united States of America, and by the Separation of Powers Doctrine.

Where the instant matter is concerned, the Separation of Powers

Doctrine is of particular importance as it has both vertical and horizontal operation, separating roles of the three distinct branches of government in the first instance, and separating operation of United States from state government in the second (New York v. United States- et al, 505 U.S. _____, 120 L. Ed. 120, 112 S.Ct. 2408 (1992)).

The Separation of Powers Doctrine prohibits Congress from exercising power not specifically delegated by the Constitution for the united States of America, and simultaneously prohibits officers of the several States, including judicial offices, from accommodating federal encroachment without constitutional amendment.

Each officer of the United States and the several States is required to take an oath of office to uphold and defend the Constitution for the united States of America, and where state officials are concerned, take corresponding oaths to uphold and defend state as well is United States constitutions.

Offices of public servants are effectively offices of trust which effect covenant obligations on the public servant to protect and preserve foundation law, inclusive of state and national constitutions, exclusive of all other commitments within the framework of public service.

When and if the public servant used public policy to exercise power not specifically delegated by applicable constitutions, he effectively perjures his constitutional oath, the constitutionally prescribed oath being a prerequisite to holding public office and which is therefore antecedent to any and all other statutory oaths, fraternal, professional and other oaths, et al, and thereby incurs in personam liability if public office is used to further any cause other than that prescribed by applicable constitutions.

Due process of law assured by both state and national constitutions is due process prescribed by English-lineage common law as it has evolved over approximately 900 years (dated from the 1066 Norman Invasion under William the Conqueror) and modified by state and

national constitutions.
"No person shall be deprived of life, liberty or property without due process of law," is a common law due process principle preserved by both state and national constitutions, particularly in the respective bills of rights.

Common law due process presumes that Judicial rather than legislative-administrative courts will be the forum in which due process is carried out.

Legislative courts are therefore incompetent when it comes to depriving the dejure people of life, liberty or property.

When and if a legislative (statutory) court deprives any of the de jure sovereign people of life, liberty or property, it effects a bill of attainder.

Bills of attainder are prohibited by state and national constitutions.

Whenever constitutional and common law indigenous to one of the several States is in conflict with statutory Code law, the foundation law, meaning constitutional and common law, in all cases prevails, which is to say, statutory law must yield or fall.

Statutory law, namely the Code of Civil Procedure, provides two safeguards which preserve superior foundation law.

The first of the two safeguards is the mandate for judicial notice. When one or another party to any given action enters pleadings based on constitutional and common law, the judicial officer has a mandate requiring judicial notice. Therefore, the judicial officer must in all cases recognize and yield to constitutional and common law if and when there is conflict with statutory law.

The second safeguard is provided by rules governing presumed fact. The statutory court, operating in a federal character to accommodate

private international law, presumes certain things to be true, many of which effect constructive trusts (fraud in operation of law) when the de jure people are involved in any given action. One of the presumptions already noted is that the several States are federal States under Congress' Article IV Jurisdiction. A second is that whomever is involved in a statutory case is a United States or corporate "person", with the implication being that of the Fourteenth Amendment citizen "subject to jurisdiction of the United States" in all matters and territories, when in reality, there are comparatively few "citizens of tile United States" who are born or naturalized in the geographical United States.

Those born in the several States party to the Constitution for the united States of America are Citizens (principals) of their respective states, and by definition, national of the United States (8 USC - 1101 (a)(22)(B)), who are vested with and entitled to all constitutional and common law rights assured by state and national constitutions.

The Fourteenth Amendment citizen of the United States is a colorable citizenship which constitutes a subject rather than a principal class (S U SC - 1101 et seq.), and be issued a certificate of naturalization by the United States Department of Justice.

Under rules governing presumed fact, anyone party to an action may enter pleadings based on legal authorities either to establish or rebut presumed fact, and if the pleading has probative value, the adversarial party has both legal and moral obligation to respond if the allegation asserted by the pleading party materially affects the suit.

If the adversarial party fails to rebut allegations set forth as presumed fact, with the rebuttal supported by legal authorities and such evidences as are necessary to refute presumptions asserted by the pleading party, the adversarial party is deemed to acquiesce to or confess presumed fact asserted by the pleading party.
The Judicial officer who presides in ministerial capacity in the statutory Court is bound by rules governing judicial notice and presumed fact.

All courts which operate in a statutory capacity under law which is in derogation of common law are courts of limited jurisdiction.

Because statutory courts are courts of limited jurisdiction, once jurisdiction is challenged, it must be proven in record.

If the Nebraska court could legitimately operate in a federal character, it would be limited to the same venue (territorial jurisdiction) as courts of the United States.

Territorial jurisdiction of Article I courts of the United States, operating under Congress' Article IV authority within the several States, would be limited to federal enclaves such as military bases, as specifically set out at 18 USC - 7(3).

Even in civil matters where courts of the United States have jurisdiction within the several States based on diversity of citizenship, federal courts must comply with common law indigenous to the state where the controversy arises, per 28 USC - 1652 (Erie Railroad Company v. Tompkins, 304 U.S. 4-92(1938)).

The instant matter was in fact presented under statutory law which presumes the state is a federal State rather than one of the several States.

The judicial officer of this court is, in fact, operating in magistrate or ministerial rather than a true Judicial capacity.

Counsel for the plaintiff has failed to rebut the defendants' pleadings with legal authorities sufficient to overcome defendants' pleadings and thereby establish proof of venue, jurisdiction and application of law in the record.

Therefore, counsel for the plaintiff has effectively confessed all matters alleged by the defendants, and has effectively defaulted the action.

However, the judicial magistrate of this court has ignored obligations established by rules governing judicial notice and presumed fact, and in issuing orders favoring the plaintiff without the plaintiff proving venue, jurisdiction and law in the record , has cooperated and conspired with counsel for the plaintiff to effect bill of attainder by way of orders issuing from tile legislative court.

This action is under admiralty rules repugnant to tile common law indigenous to the Nebraska republic, one of the several States, effectively and fraudulently brings admiralty inland to execute the rule of prize against de jure Citizens of the Nebraska republic.

By serving in a federal capacity, the Judicial magistrate of this court is knowingly abridging the Separation of Powers Doctrine, extending federal authority beyond its lawful bounds' within the several States, and is otherwise accommodating foreign principals in the framework of private international law.

The judicial magistrate of this court does in fact benefit from this generally undisclosed service through which the de jure people who are Citizens of Nebraska and other state republics, known as the several States, are routinely subject to law which is not known to and is therefore repugnant to the Nebraska Constitution and the intent of the Constitution for the united States of America.

The judicial magistrate of this court has effectively perjured his constitutional oath of office and otherwise betrayed the obligation of public trust by operating in a federal judicial magistrate capacity, imposing or attempting to impose a form of law foreign and therefore repugnant to the Nebraska Constitution, representing a foreign principal, the Central Authority (28 USC - 0.49), without disclosing that the court is accommodating private international law, and ignoring statutory mandates set out under rules governing Judicial notice and presumed fact.

Where the instant matter is concerned, I the judicial officer of the *nisi prius* District Court have ruled in favor of parties alleging to have secured property by execution oil transcript issued by the County

Court of Thayer County Nebraska Case No. 13845.

I am now and was aware that the property sold was done so as an administrative action, and would have been carried out by officers or agents of the Sheriff of Thayer County Nebraska. I am also aware that the alleged debt has been paid without prejudice, under threat, duress and coercion.

I am a bar-licensed attorney in the State of Nebraska, and as a schooled attorney, aside from my capacity as a judge, I am aware that the Fifth Amendment to the constitution for the united States of America, and Article I and 3 of the Nebraska constitution, provide that, "No person shall be deprived of life, liberty or property without due process of law."

I, as a professional in the legal profession, am aware that admiralty and administrative actions are not due process of law within the meaning of these constitutional provisions, due process being that prescribed by the English-American lineage common law indigenous to the Nebraska republic.

I. the judicial magistrate of this court, understand and fully realize that should I fail to rebut matters set out in this interrogatory, supporting my rebuttal with legal authorities sufficient to overcome allegation set out herein, that the allegation will serve as presumed fact for legal purposes.

I, the judicial officer of this court, understand and fully realize that the cloak of judicial immunity extends only so far as the court's lawful jurisdiction, and that when I have ignored mandates to prove jurisdiction, have exceeded the jurisdiction of the court, and have otherwise ignored and refused to enforce mandates governing conduct of the court, I shed the cloak of judicial immunity, thereby assuming in personam liability, whether to collateral, direct attack and/or criminal prosecution.

I, the judicial magistrate of this court, understand and fully realize

that if I fail to rebut and successfully refute allegations set out in this interrogator with sufficient legal proof to establish the authority and character of the court as a judicial court of the Nebraska republic operating in the framework of common law indigenous to the Nebraska republic, the defendant and complaining party may utilize presumed fact established by this interrogatory as prima facie evidence to support judicial complaints and otherwise seek my removal from office, as grounds to seek criminal prosecution, and as grounds to seek civil remedies against me personally.

Should I fail to rebut allegations set out herein within the grace period of twenty days provided by the defendants and complaining parties, I will be deemed to have confessed the allegation and it may be construed that I have endorsed the allegations by accommodation. In the alternative, I will comply with rules governing judicial notice and presumed fact, and cause the adversary parties in this action to answer allegations set out by the complaining party herein, thus fulfilling my statutory obligation as judicial magistrate of the District Court of Thayer County, Nebraska.

I, by my signature attest that to the best of my knowledge, all matters of law and fact set out above are accurate and true.

_____ _____

Orville Coady, Judge Date

NO RESPONSE RECEIVED

Unpublished

Thayer County Bank Correspondence

Debt Settlement Agreement

January 9, 1997

Mr. Gene A. Davenport, President
R.R.1, Box 6A
Belvidere, NE 68315

RE: Settlement Agreement

Dear Gene:

I am enclosing a copy of a proposed settlement agreement for your review. If it meets with your approval please execute the same in front of a Notary or come in and do so and we can furnish a Notary.

I believe that this is fundamentally what we have discussed on the phone. I have provided schedules of the debt on the attached sheet with interest computed through January 15, 1997. The one thing that we considered which is in addition to our prior discussions was dealing with the security interest in the new aircraft if you should be able to pay off the land portion and the existing ag-cat loan for the amounts specified. If that would happen and you would only have the new ag-cat for us to hold to secure the balance of the agreement, we would need to then work with you and Hershey in perfecting a security interest in the new aircraft.

I know that you may have different beliefs about legal documents than we have which might make you desire to significantly change this agreement. This agreement is in both of our better interest I believe and I think you do also. I want to convey that any material delays in having this agreement signed and the delivery of the $20,000 of accounts receivable or cash as specified will likely result

in the Bank taking another approach to resolving this matter. Presently there are two alternatives. One, since you have again made this a Federal Court matter, would be to turn this over to a larger firm who could expeditiously run this through the Federal and State court systems which would result in large losses for both of us. Or two, the sale of the entire note and accompanying security package at a deep discount to an outside party who may have an interest in an operation in this area. In either case, we would both be losers. I would prefer that we both come out as well as we can from this situation.

Sincerely,

/s/_____

DEBT SETTLEMENT AGREEMENT

THIS agreement is made and entered into on this the. 15th day of January, 1997 by and between **Gene A. Davenport** and **Elaine B. Davenport,** individually and as husband and wife, of Belvidere, Nebraska and **Davenport Aviation, Inc.,** a Nebraska Corporation, of Belvidere, Nebraska, hereinafter collectively referred to as "Debtors", and the **Thayer County Bank,** a Nebraska Banking Corporation of 409 Lincoln Avenue, Hebron, Nebraska, hereinafter referred to as "Bank".

WITNESSETH THAT

WHEREAS, Bank and Debtors are currently engaged as Plaintiff and Defendants respectively in a lawsuit pending before the District Court of Thayer County, Nebraska as shown by the records of the office of the Clerk of the District Court of Thayer County, Nebraska; and,

WHEREAS, additional litigation by Bank against Debtors for foreclosure of mortgages or exercise of power of sale under trust deeds has been delayed as a result of attempts by the parties to negotiate a settlement of Debtors' obligations to Bank; and,

WHEREAS, Bank has a current outstanding obligation due it from Debtors in the amount *of* $439,414.13, and, the parties desire to enter into a Debt Settlement Agreement.

NOW THEREFORE it is agreed by and between the parties as follows:

I . Debtors shall compromise and settle their total indebtedness due to Bank with the payment of Two Hundred Fifty Thousand Dollars ($250,000.00) in U.S. Currency by Certified Federal or State Chartered Bank Draft on the date of the execution of this agreement or as provided hereinafter.

2. In the event that Debtors elect not to pay Bank as provided in paragraph one (1) above, then in such event, Debtors agree as follows:

A. That they shall assign, transfer, and deliver to Bank contemporaneous with their execution of this agreement Twenty Thousand Dollars ($20,000-00) of Bank pre-approved accounts receivables.

B. That they shall contemporaneous with their closing of a sale of that secured Ag Cat Airplane pay to Bank Seventy-five Thousand Dollars ($75,000,00).

C. That they shall contemporaneous with their sale of new Ag Cat Airplane, now under construction, pay to Bank the sum of Seventy Thousand Dollars ($70,000.00); and, until such time as the new Ag Cat Airplane is sold, the Bank shall receive from Debtors a valid perfected second lien position on such plane.

D. That they shall, upon their refinancing, at or with another lender, of their existing real estate indebtedness pay to Bank the sum of Eighty-five Thousand Dollars ($85,000.00).

All payments called for in subparagraphs 2(B.), 2(C.) and 2(D.) Above shall be paid to Bank by Debtors in U.S. Currency by Certified Federal or State Bank Chartered Bank Draft.

3. Bank and Debtors agree that Debtors shall have until the 1st day of April, 1997 to make those payments called for in

paragraph 2(B.), 2(C.) and 2(D.) Above; and, that Debtors expressly waive any defenses of statute of limitation, unperfected security interest, and failure of or lack of consideration on all promissory notes, financing statements, and security agreements given Bank by Debtors.

4. Bank agrees to forebear pursuing that litigation pending before the District Court of Thayer County, Nebraska and the bringing of any additional action to enforce its fights under real estate mortgages or deeds of trust until after the expiration date for performance by Debtors as provided in paragraph 3 above.

5 . In the event Debtors either negotiate a sale or refinancing of their currently used Ag Cat Airplane or real estate, they shall in addition to making the above called for payment(s) to the Bank for release of Bank's security position execute and deliver to Bank a validly perfected second lien position on the new Ag Cat Airplane (now under construction).

6. In the event that Debtors make an assignment for benefit of any other creditor, become insolvent, are adjudged insolvent, or avail themselves of the provisions of the Federal Bankruptcy Act as voluntary Petitioners or in the event their is an involuntary petition in bankruptcy filed against Debtors, then in any such event this agreement shall be deemed to be null and void and of no force and effect.

7. That any action touching upon this agreement or arising out of the relationship between Bank and Debtors shall be brought in the District Court of Thayer County, Nebraska only and shall be construed according to the laws of the State of Nebraska.

8. Any payments made by Debtors before a default should occur under paragraphs numbered three (3) and six (6) of this agreement shall be applied by Bank as normal payments in the event of subsequent default by Debtors under this agreement.

9. This agreement shall be binding on the parties, their personal representatives, successors and assigns.

ATTEST-. DAVENPORT AVIATION, INC.

_____ by _____

Secretary Its President

Gene A. Davenport Elaine B. Davenport

DEBTORS

THAYER COUNTY BANK, a Nebraska Banking Corporation

By_____
Its President

Unpublished

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GENE ALLEN DAVENPORT

v. 4:CV97-3001

ORVILLE L. COADY, et. al.

MEMORANDUM, ORDER AND RECOMMENDATION

Pursuant to District Judge Richard G. Kopf's referral (filing 10) and 28 U.S.C. S 636 (b) (1) (A, B), the following motions are before me for resolution: defendants' motions to dismiss (filings 9, 16, 17, 20, and 23) ; defendants' motion for Rule 11 sanctions (filing 21); defendant's objection to plaintiff's motion for summary judgment (filing 26) ; plaintiff's motions for summary judgment (filings 19, 24, and 25); plaintiff's motion to deny Defendant Coady's motion to dismiss (filing 11); and plaintiff's motion for default judgment as against Defendants McLaughlin and Young (filing 18). As explained below, I conclude plaintiff's complaint fails to comply with Fed. R. Civ. P. 8 (a) (2) and thus, recommend it be dismissed.

ALLEGATIONS

Plaintiff has filed a complaint (filing 1) against numerous defendants, including a judge, a law enforcement officer, and elected official, several attorneys, and financial institutions.

Plaintiff's complaint is virtually incomprehensible. It generally consists of statements about the "American Free Flag of Peace," bald allegations of liability on such purported legal theories as "Perjury of Oath," " Duress," "Chilling Effect Doctrine," and "Deprivation of Rights," and is almost completely devoid of any allegations of fact. Plaintiff makes only a cursory attempt to identify the alleged acts

and/or omissions on which his complaint purportedly is based. Plaintiff states that there was an agreement to dismiss a case involving Citizens State Bank and that Thayer County Bank filed a cross petition which was allowed by the presiding judge. Plaintiff fails to set forth the alleged conduct attributable to each of the numerous defendants.

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint must contain, inter alia:

> (2) a short and plain statement of the claim showing that the [plaintiff] is entitled to relief . . . . .

Fed.R.Civ.P. 8 (a) (2). This short and plain statement must provide "fair notice of the plaintiff's claims and ground for relief." Smith v. St. Bernards Reg. Med. Center, 19 F.3d 1254, 1255 (8th Cir. 1994). A complaint, however, "that contains merely bare allegations of liability," does not provide the opposing parties with the 'fair notice" required by Rule 8. Arkansas v. Fatjo, 148 F.R.D. 570 (S.D. Tex. 1993) (citations omitted). "Even the liberal notice pleading allowed by the federal rules requires a pleading to include the operative facts upon which the pleader bases his claim." Id. (citation omitted).

Here there is nothing in plaintiff's complaint which remotely resembles the requisite "short and plain statement of the claim", much less provides defendants with fair notice of plaintiff's purported grounds for relief. Although a pro se complaint is to be liberally construed,
Haines v. Kerner, 404 U.S 519, 520-21 (1972), it must contain specific facts supporting its conclusions. Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). A party's pro se status does not immunize such litigant from the requirements of Rule 8. See Michaelis v. Nebraska State Bar Ass'n, 566 F. Supp. 89, 92 (D. Neb.), aff'd, 717 F.2d 437, 439 (8th Cir. 1983). Thus, plaintiff's wholesale failure to set forth any facts in the complaint in support of

his myriad legal claims clearly violates Fed.R.Civ.P 8 (a) (2).

Defendants' Motions

Defendants have filed motions to dismiss (filings 9, 16, 17, 20 , and 23). In light of plaintiff's plain failure to plead supporting facts, it is axiomatic that the complaint does not state a claim upon which relief may be granted, even under the most liberal of standards. See Carney v. Houston, 33 F. 3d 893, 894 (8th Cir. 1994) (consideration of motion to dismiss requires the court to construe allegations in the complaint in light must favorable to plaintiff). In fact, the complaint is wholly frivolous as it contains virtually no allegations of any specific facts suggesting the existence of a claim against the defendants. Therefore, I shall recommend defendants' motions to dismiss the complaint (filings 9, 16, 17, 20, and 23) be granted pursuant to Fed. R. Civ.P. 12 (b) (6). 1,2

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1. It should be noted that a motion to dismiss pursuant to Fed.R.Civ.P 12 (b) (6) is an appropriate mechanism to challenge "the form and sufficiency of a statement of a claim under Rule 8 (a) (2) . . . . . " 5 Charles a. Wright and Arthur R. Miller, Federal Practice and Procedure 1203 (2d ed. 1990) (explaining that 'critical issue" in considering Rule 12 (b) (6) motion is the sufficiency of the complaint as governed by Rule 8 (a), aff'd , 938 F.2d 185 (8th Cir. 1991) , cert. denied, 502 U.S. 900 (1991).

2. Plaintiff's complaint appears to be similar to others recently filed in this court, which contain identical allegations against other defendants. Filing merit less complaints which are groundless is abusive of this court and its process, for such complaints deprive the court of its resources, which should be used to resolve citizens' legitimate disputes. Plaintiff is advised that future complaints which fail to raise legitimate claims may cause the imposition of sanctions against him, monetary and otherwise. See Fed.R.Civ.P. 11. Defendant Kenner filed an "Objection to Motion for Summary Judgment . . . " (filing 26) in response to plaintiff's motion for summary judgment against him (filing 24). Such a filing is an

improper pleading under the local rules. "No 'answer,' or 'opposition,' or 'response' to a motion, or any similarly titled 'pleading' in opposition to a motion shall be filed, delivered or served." NELR 7.1 (b). An opposing brief is the proper response to defendant's motion to dismiss. 3 NELR 7.1 (b) As such, I shall deny plaintiff's objection (filing 26) because such pleadings do not comply with NELR 7.1(b).

Defendants Young and McLaughlin filed a "Motion for Rule 11 Sanctions" as well as a brief and index of evidence in support of the motion asking the court to :impose appropriate sanctions against the Plaintiff for filing a Motion for Default Judgment in this proceeding." (Filing 21). Defendants Young and McLaughlin have failed to allege that they have followed the provisions of Fed.R.Civ.P 11© (1). Specifically, Defendants Young and McLaughlin have failed to show that they waited 21 days after service of the motion on plaintiff to allow him to withdraw his motion for default judgment before filing their motion with the court. Fed.R.Civ.P. 11 (c)(1)(A). In fact the only indication of service upon the plaintiff is the certificate of service accompanying the filed motion which indicates that a copy of the motion was mailed to plaintiff on the same day that it was filed. Therefore, I shall recommend that Defendants Young and McLaughlin's "Motion for Rule 11 sanctions" (filing 21) be denied.

Plaintiff's Motions

Plaintiff also has outstanding motions before the court. Plaintiff has filed motions for summary judgment (filings 19, 24, and 25) against Defendants Coady, Murray, Van Cleef, Kenner, and Burnes. Plaintiff has not even attempted to comply with the local rules pertaining to

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3. Plaintiff has submitted a brief in support of his motion which I shall construe as a brief in opposition to defendant's motion to dismiss.

such motions, See NELR 7.1 (a) (2) and 56.1 (a), much less demonstrated that there exists no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Rather, plaintiff's supporting materials consist entirely of "Affidavit[s] of Amount Due" and "Brief[s] in Support of Motion for Summary Judgment", which in turn consist of nothing more than unsupported legal conclusions and numerous attachments of unknown and unexplained origin. Based on the obviously premature nature of plaintiff's motion, the woefully inadequate nature of his supporting materials, and his flagrant disregard of the procedures governing summary judgment as set forth in the Federal Rules of Civil Procedure and the local rules of this court, I shall recommend plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied.

Plaintiff has filed a "Motion to Deny" Defendant Coady's motion to dismiss (failing). I shall deny plaintiff's "Motion to Deny" because, first, plaintiff's complaint does not conform to Rule 8, as explained above, and, second, such motions do no comply with NELR 7.1(b).

Plaintiff also has filed a "Motion for Default Judgment" (filing 18) against Defendants Nancy C. McLaughlin and Gary Young. The issuance of default judgments are not favored by the law and are generally granted for willful violations of court rules or intentional delays. See United States ex rel. Time Equipment Rental U Sales, Inc. V. Harre, 983 F.2d 128, 130 (8th Cir. 1993); In re Jones Truck Lines, Inc., 63 F.2d 685, 688 (8thCir. 1995). According to my calculations the deadline for responding to plaintiff's complaint with

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4. The copy of the return receipt signed by Defendant McLaughlin filed with the summons on January 13, 1997 shows a delivery date of January 7, 1997. The date of service on Defendant Young is unclear. Plaintiff has filed a copy of the envelope sent certified mail, postmarked January 6, 1997 which was returned, refused.

respect to Defendant McLaughlin was January 27,1997. 4 The court record reveals that Defendants McLaughlin and Young's motion to dismiss (filing 17) was filed on February 3, 1997, five business days late and on the same day as the plaintiff's motion for default judgment (filing 18). There is no indication that defendant McLaughlin and Young's failure to timely file a response was due to intentional delay. Therefore, I shall deny plaintiff's "Motion for Default Judgment" (filing 18).

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff's motion for default judgment (filing 18) is denied.
2. Plaintiff's "Motion to Deny" (filing 11) is denied.
3. Defendant Kenner's "Objection to Motion for Summary Judgment by Defendant Patrick Kenner" (filing 26) is denied.

FURTHER, IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, pursuant to 28 U.S.C. S 636(b), as follows:

1. That defendants' motions to dismiss for failure to state a claim (filing 9, 16, 17, 20, and 23) be granted;
2. That Defendants Young and McLaughlin's motion for Rule 11 sanctions (filing 21) be denied;
3. That plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied; and
4. That plaintiff's complaint (filing 1) be dismissed as to all defendants.

Plaintiff is hereby notified that unless objection is made within ten days after being served with a copy of this recommendation, plaintiff may be held to have waived any right to appeal the court's order adopting this recommendation.

Dated April 7, 1997.

BY THE COURT

/s/_____

United States Magistrate Judge

Unpublished

IN THE DISTRICT COURT OF THAYER COUNTY, NEBRASKA

CITIZENS STATE BANK, A Nebraska Banking Corporation

vs Case No. 13,845

Gene A. Davenport and Elaine B. Davenport, husband and wife and THAYER COUNTY BANK, A Nebraska Banking Corporation

BILL OF EXCEPTIONS-Proceedings before the HONORABLE ORVILLE L. COADY, JUDGE, at Hebron, Nebraska on April 16, 1997.

APPEARANCES
For the Plaintiff:
For the Defendant: Gene A. Davenport Pro se

CERTIFICATE
I, W. Don McIntyre, official court reporter in the district court of Nebraska for the State of Nebraska, do hereby certify that the within and following bill of exceptions is correct and complete, and contains all matters required to be included herein pursuant to the praecipe filed April 18, 1997, and the rules of the Supreme Court of the State of Nebraska; that said bill of exceptions consist of :

VOLUME I - PROCEEDINGS (Pages 1 to 8, incl.)

That the cost of said bill of exceptions is (no charge), an amount permitted to be charged by Neb. Rev. Stat. 24-342 (Reissue 1985)

Dated this 15th day of May, 1997.

_____
Official Court Reporter

(At 10:20 a.m. on April 16, 1997, in the district court of Thayer County, in Hebron, Nebraska, before ORVILLE L. COADY, JUDGE, with Mr. Gene A. Davenport, the defendant representing himself, the following proceedings were had:)
THE COURT: Mr. Davenport has filed a Motion to Dismiss with prejudice. Mr. Davenport appears, and you may make whatever record you wish to make, Mr. Davenport.
MR. DAVENPORT: All right. I guess first of all, Your Honor, I'd ask you to rule on my Motion to Dismiss with Prejudice.
THE COURT: Why would I do that? Why should I do that?
MR. DAVENPORT: Because the opposition has defaulted on both the discovery and the hearing. We have proof that the attorney has failed to obey --
THE COURT: What did they fail to do?
MR. DAVENPORT: Your order precisely said that they should have their letter outlining discovery in the mail on the 14th.
THE COURT: And you didn't get it until the 18th. Boy, that's an awful problem, isn't it?
MR. DAVENPORT: Well, I am working real hard at learning procedures and doing this the way it's supposed to be, given the fact that it didn't occur, the pro se should not be held as the same stringent standard as attorneys. It seems to me it would only be judicially correct and in the interest of justice that the attorneys have to do the same.
THE COURT: Four days?
MR. DAVENPORT: If I was disobeying an order that you gave me -
THE COURT: If you were four days late what would I have done to you? Of all of the things you haven't known about, all of the things that you do your own way, What have I ever done to you? Nothing.
MR. DAVENPORT: If you issue an order for notice or something by a certain date and I fail to do so, and I would expect to also face the full contempt powers of the Court.
THE COURT: You would until you really thought I was going to do it, then you would say can I have a couple of extra days to get this done.
MR. DAVENPORT: But the attorney failed to do that, Judge.
THE COURT: Well, what do you mean he failed to do it?

MR. DAVENPORT: He hasn't asked for an extension.
THE COURT: No, but you get to see what you want to discover.
MR. DAVENPORT: But they're attaching condition to it, this service is defective.
THE COURT: All they had to do was mail you a letter. My order didn't say that they had to serve anything on you, just said to mail a letter.
MR. DAVENPORT: And they failed to do that in the time frame you outlined.
THE COURT: Yes, I know that, but well--
MR. DAVENPORT: The fact of the matter is, Judge, that they're attempting to deceive the Court by backdating the letter, and then it was post marked on the 17th. Now, that's hardly complying with your order.
THE COURT: Yeah, that's a day off.
MR. DAVENPORT: If the shoe was on the other foot, wouldn't I be in trouble here?
THE COURT: No. The shoe has been on the other foot time and time again, and you haven't been in trouble.
MR. DAVENPORT: You believe I failed to do whatever you ordered to me to do?
THE COURT: I have--I'm sure you did, but you're pleading, you know. Frankly everybody is putting up with a lot with you, you're doing your thing your own way.
MR. DAVENPORT: Judge, I am trying to do it by the rules, by the Court's rules.
THE COURT: I know, but if you believe that you're doing things by the normal rules all the time that we've been here, why you're mistaken.
Everybody's just living with you trying to give you a chance **to make all the record you want to.** (emphasis added) But, you know and I know that you need help.
If you've got any real complaint and you're prejudiced in any real way, I would grant your motion. I don't know about dismissing the whole case, but I would grant your motion. (emphasis added). But you haven't been hurt in any way, any real way. And no matter what newspapers say, Courts just don't go on

technicalities all the time or hardly ever.
I know this whole world thinks everything is done on technicalities, but it isn't, and it never has been. Now, what you wanted was an opportunity to see certain documents and several of them.
Documents that I guess that probably all of them you had signed at one time or another, and you're going to get to do that and so you are getting what you want. And I'm not going to dismiss a whole case over two or three days late, his mailed letter.
You know and I know, Mr. Davenport, life is not that simple.
MR. DAVENPORT: I am very much aware of that, Judge.
THE COURT: It's not that simple, and if I were going to do anything at all, I might fine them. But this case doesn't call for a fine.
MR. DAVENPORT: In all fairness, it looks like it could at least be dismissed without prejudice. Let them start over and do it right. All I am asking is that they adhere to the rules just like I am attempting to do.
THE COURT: **Well, see, that tends to be harassment when you say, hey, make them do more.** (Emphasis added)
MR. DAVENPORT: I'm only asking that they do--that they note the Court's rules, Your Honor.
THE COURT: **And they have, they just were a little bit late.** (Emphasis added)
MR. DAVENPORT: But that service was defective.
THE COURT: **There wasn't any service required.** (Emphasis added). What do you mean defective?
MR. DAVENPORT: I got a subpoena and a notice of deposition and it has plenty of problems.
THE COURT: **I don't know, that's a different matter. I don't know anything about a deposition.** (Emphasis added)
MR. DAVENPORT: That's what the Sheriff served on me.
THE COURT: Then, you know, **I don't** (Emphasis added) know what's wrong with the deposition.
MR. DAVENPORT: Nothing, but they're asking for items that are not relevant to an action in replevin.
THE COURT: Well, that may be, I don't know. But you know, nor ally what you would do, you would appear with a lawyer and if they were doing something that they weren't entitled to do, you would say

I'm not going to answer on the advice of my counsel.
But at least you would have somebody telling you, giving you an idea what is a relevant and what isn't relevant. And almost everything is probably relevant. No, I can't rule on these things in advance and I don't know what they're going to ask you in your deposition.
MR. DAVENPORT: Would you like to see a copy?
THE COURT: That wouldn't tell me anyway, no. I'm not--you see, you get-- see, I'm telling you just keep doing your own procedure.
MR. DAVENPORT: Judge, I am using the procedure of this Court, the rules of this Court.
THE COURT: No, you're not.
MR. DAVENPORT: I am not making up my own rules.
THE COURT: No, you're not, you're doing that. Well, you may be following the same rules, but you don't like the answers you get.
You filed a motion to dismiss this case and I am telling you I'm not going to dismiss this case over a little three-day late letter.
And I'm not going to dismiss this case because somebody asked to take a deposition from you. So if you're prejudiced in any way, something really hurting you in the way they're doing, tell me.
Otherwise, let's do as we usually do and I'll say, Mr. Davenport, I have got more studying to do.
MR. DAVENPORT: Judge, I guess, in the interest of justice, that I'd have to demand that you recuse yourself from this case. You're obviously biased against us, because there's a conflict of interest.
THE COURT: Well, there's no conflict of interest and there's no bias. And I guess we are in Federal Court and they can be decide that, and I will be glad to abide by their rules. But you can't make up your own law.
MR. DAVENPORT: Then for the record, I guess I will give notice that we intend to appeal the decisions here today.
THE COURT: Well, that's fine. You make whatever record you'd like to. I know you're a good man and I know that you have had hard luck, but I can't solve it for you.
MR. DAVENPORT: Am I given to understand then that you're refusing to recuse yourself, Judge?
THE COURT: Yes. Okay. I will have the other side make a proper journal entry.

All right. We are adjourned unless there's more you wish to put on the record.
MR. DAVENPORT: No, I guess not.

(Hearing concluded)

Unpublished

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GENE ALLEN DAVENPORT

vs. 4:CV97-3001

ORVILLE L. COADY, et. al.,

JUDGMENT

Pursuant to the court's Memorandum and Order previously filed in this matter, final judgment is entered in favor of the defendants and against the plaintiff, providing that the plaintiff shall take nothing as against the defendants and the plaintiff's complaint is dismissed with prejudice.

DATED this 29th day of April, 1997.

BY THE COURT

/s/_____
Richard G. Kopf
United States District Judge

Supreme Court, U.S.
FILED
APR 8 1998
CLERK

No. 97-1495

In The

Supreme Court of the United States

October Term, 1997

GENE ALLEN DAVENPORT,

Petitioner,

vs.

ORVILLE L. COADY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has stated any basis for this Court to exercise its power of certiorari in this case.

2. Whether the referral of Respondents' motion to dismiss to a magistrate judge for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B), violated Petitioner's constitutional rights.

LIST OF ALL PARTIES TO THE PROCEEDINGS AND THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to these proceedings are:

List of Petitioners:

1. Gene A. Davenport

List of Respondents:

1. Orville L. Coady
2. Arthur P. Burnes
3. Joseph Murry
4. Gary R. Young
5. Nancy C. McLaughlin
6. Patrick Kenner
7. Thayer County Bank
8. Lloyd Vancleef
9. Citizens State Bank

The court whose judgment is under review is the United States Court of Appeals for the Eight Circuit.

Respondent, Thayer County Bank, is a Nebraska banking corporation. Thayer County Bank is a subsidiary of Thayer Agency, Inc. Thayer County Bank has no subsidiaries.

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Respondents, Patrick Kenner and Thayer County Bank, respectfully request that the petition for writ of certiorari be denied.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is unreported. The opinion of the district court (App. E, *infra*, 14a-15a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 25, 1997. (App. B, *infra*, 3a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 636(b)(1) provides, in pertinent part:

* * *

Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may

reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1).

STATEMENT OF THE CASE

On January 6, 1997, Petitioner, Gene Allen Davenport ("Davenport") filed a "Complaint" in the United States District Court for the District of Nebraska against a Nebraska district court judge, two attorneys, a county sheriff, the clerk of the district court, two Nebraska banks, and the banks' respective chief operating officers. (App. G, *infra,* 17a-27a). The "Complaint" contained a mish-mash of allegations, accusations, and incorrect and misplaced citations of legal principles. Davenport accused Patrick Kenner and Thayer County Bank of "duress," "chilling effects doctrine," "deprivation of rights," "constitutional court," "conspiracy," "tort," "larceny by fraud or deception," and "extortion." Davenport concluded with a demand for $4,600,000 in damages under the guise of the "American Flag of Peace." Ironically, at the same time the "Complaint" demanded recovery against the Respondents, Davenport alleged that the court "lacked jurisdiction over the private citizen [Petitioner]."

All of the defendants named in the "Complaint," including Respondents, Thayer County Bank and its chief executive officer, Patrick Kenner [collectively "Thayer County"], eventually moved to dismiss the "Complaint" for failure to state a claim.

The motions to dismiss were referred to United States Magistrate David L. Piester for a report and recommendation by United States District Judge Richard G. Kopf pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (App. C, *infra,* 5a).

On April 7, 1997, Magistrate Piester entered a memorandum, order and recommendation. (App. D, *infra,* 6a-13a). Magistrate Piester recommended that the motions to dismiss be granted and that a motion for summary judgment

filed by Davenport be denied. *Id.* Magistrate Piester concluded that the Complaint should be dismissed. Davenport filed a timely objection to Magistrate Piester's recommendation. (App. H, *infra,* 28a-29a).

Pursuant to 28 U.S.C. § 636(b)(1), Judge Kopf reviewed Magistrate Piester's recommendations *de novo*, agreed that the "Complaint" should be dismissed and the motion for summary judgment should be denied, and entered a judgment dismissing Davenport's Complaint. (App. E, *infra,* 14a-15a).

On May 5, 1997, Davenport appealed the dismissal of the "Complaint" to the United States Court of Appeals for the Eighth Circuit. Following briefing by the parties, the court of appeals affirmed the dismissal of the "Complaint" *per curiam.* (App. A, *infra,* 1a-2a). A judgment affirming the district court was entered the same day. (App. B, *infra,* 3a-4a).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied. Davenport has set forth no compelling reasons why certiorari would be appropriate in this case. Davenport has identified no conflicting decisions between United States Courts of Appeal, no conflicting important federal questions between a United States Court of Appeals and a decision by a state court of last resort, and no United States Court of Appeal decision which is so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

Instead, Davenport simply alleges that he was deprived of his "constitutional rights," apparently by the referral of Davenport's motions to dismiss to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636. Because 28 U.S.C. § 636 is constitutional, Davenport has identified no

reason, compelling or otherwise, which would justify this Court's exercise of its certiorari power. Accordingly, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER HAS SET FORTH NO COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED.

This Court has identified several important factors which it considers in determining whether to grant certiorari. None of those factors are present here. Accordingly, the petition should be denied.

Supreme Court Rule 10 provides that a petition for writ of certiorari will be granted "only for compelling reasons." Rule 10 identifies the following criteria, which indicate the character of the reasons the Court considers in determining whether certiorari is appropriate:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that

> conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

S. Ct. Rule 10. Rule 10 concludes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Thus, Rule 10 sets forth the parameters of when and under what circumstances this Court will consider favorably a petition for writ of certiorari. In addition, this Court has held that it will not grant a certiorari merely to review evidence or inferences drawn from it, *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938), that certiorari is granted only in cases involving principals, the settlement of which is of importance to the public as distinguished from parties, *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951), and in cases where there is real and embarrassing conflict of opinion and authority between courts of appeal. *Id.*

In the case at bar, Davenport has identified none of the criteria which this Court has traditionally considered in determining whether to grant a petition for writ of certiorari. There are no conflicting decisions of United States Courts of Appeal in this case. There is no decision by a state court of last resort regarding an important federal question which conflicts with a decision of another state court of last resort in the United

States Court of Appeals. There is no important question of federal law that has been decided by a state court or United States Court of Appeals which has not been, but should be, settled by this Court.

In short, Davenport has identified none of the traditional criteria upon which this Court has customarily relied in granting certiorari in the past. Instead, Davenport simply wants this Court to address the same claims which have already been addressed and disposed of by a United States Magistrate Judge, a United States District Court Judge, and a panel of the United States Court of Appeals for the Eighth Circuit. Accordingly, there is no reason for this Court to grant the petition for writ of certiorari in this matter. The petition for writ of certiorari should be denied.

Furthermore, the basis for Davenport's petition for writ of certiorari is entirely unclear. Apparently, Davenport is complaining about alleged constitutional violations resulting from the district court's referral of the motions to dismiss to Magistrate Piester. However, there are many extraneous and unrelated matters, misstatements, and irrelevant contentions set forth in Davenport's petition and appendix, matters that do not appear in the record. Pursuant to Supreme Court Rule 15(2), Thayer County hereby points out to the Court that pages 7-51 and pages 58-63 of the appendix to Davenport's petition appear nowhere in the district court file or in the record before the court of appeals. Accordingly, Thayer County does not believe that those portions of Davenport's appendix fairly reflect the facts and circumstances upon which the district court entered its order in this case, and upon which the appeal to the court of appeals was based.

In any event, Davenport's petition has identified none of the factors set forth in Supreme Court Rule 10 which would indicate the existence of an issue or question important enough for this Court to consider exercising its power of certiorari.

II.

THE REFERRAL OF RESPONDENT'S MOTION TO DISMISS, PURSUANT TO 28 U.S.C. § 636(b)(1)(B), DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Davenport's petition does not clearly state his position, which presents the same problems that Thayer County faced in dealing with Davenport's "complaint" filed in the district court below. It appears that Davenport is complaining about the referral of the various motions to dismiss to Magistrate Piester for a report and recommendation. Davenport appears to contend that this referral violated his constitutional rights in some way. Because the constitutionality of 28 U.S.C. § 636 has been previously addressed and disposed of by this Court, Davenport's complaints about alleged deprivation of constitutional rights are without merit.

28 U.S.C. § 636(b)(1) provides, in pertinent part:

* * *

> Notwithstanding any provision of law to the contrary —
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which

relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1).

Davenport appears to allege that the procedure involved in this case, the procedure sanctioned by 28 U.S.C. § 636(b), is unconstitutional. However, the constitutionality of 28 U.S.C. § 636(b) has been squarely addressed by this Court. *United States v. Raddatz*, 447 U.S. 667 (1980). In *Raddatz*, this Court granted certiorari

> to resolve the constitutionality of a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), which permits a district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations.

Raddatz, 447 U.S. at 669. As Davenport seems to argue here, the respondent in *Raddatz* asserted that the referral of certain dispositive issues to a United States magistrate for a report and recommendation was violative of the United States Constitution. Finding the provisions allowing such referral to be wholly constitutional, this Court upheld the validity of the statute.

In *Raddatz*, the Court analyzed the provisions of 28 U.S.C. § 636(b)(1) to determine whether the referral of a dispositive motion to a magistrate judge for a report and recommendation unconstitutionally delegated the district court's Article III power to the magistrate.

> Certain "dispositive" motions, including a "motion . . . to suppress evidence in a criminal case," are covered by § 636(b)(1)(B). As to these "dispositive" motions, the district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of

the court proposed findings of fact and recommendations for the disposition, by a judge of the court of [the] motion". However, the magistrate has no authority to make a final and binding disposition. Within 10 days after the magistrate files his proposed findings and recommendations, any party may file objections. The statute then provides:

> A judge of the court shall make a de novo *determination* of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions. § 636(b)(1) (emphasis added).

Raddatz, 447 U.S. at 673-74.

Turning to the constitutional challenge to § 636(b)(1)(B) and (C), the Court determined that those provisions do not violate the due process clause of the Fifth Amendment in Article III of the United States Constitution.

> We conclude that the due process rights claimed here are adequately protected by §§ 636(b)(1)(B) and (C). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude

> that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witness itself.

Id. at 680-81. The Court concluded that the statute "strikes the proper balance between the demands of due process and the constraints of Art III." *Id.* at 683-84.

While *Raddatz* involved referral of a motion to suppress evidence, that was the same type of "dispositive motion" listed in 28 U.S.C. § 636(b) which was referred to Magistrate Piester for a report and recommendation in the case at bar. As in *Raddatz*, the district court in this matter had the statutory authority under 28 U.S.C. § 636(b) to refer the motions to dismiss to a magistrate judge for a report and recommendation. And, as in *Raddatz*, the district court retained "the ultimate authority to issue an appropriate order." *See Raddatz*, 447 U.S. at 682. Accordingly, to the extent that Davenport's petition can be construed to include any constitutional challenge to 28 U.S.C. § 636(b), that issue has already been addressed and rejected by this Court.

Furthermore, while Davenport's position is far from clear, Davenport appears to argue that the process which was employed was unconstitutional, and not that the district court failed to follow the process which was in place. If, in fact, Davenport's petition can be construed as asserting that the district court failed to follow the proper statutory procedure, rather than contending that the statute itself is unconstitutional, Davenport's petition is also without merit. The motions to dismiss, dispositive motions under 28 U.S.C. § 636(b)(1)(B), were referred to a magistrate by a district court judge. The magistrate performed a thorough and careful review of the Complaint, concluded that it was without merit, and recommended that the motions to

dismiss be granted. The district court conducted a *de novo* review as required by Section 636, agreed with the magistrate's recommendation, and entered judgment on that basis. Based on the record, it is clear that the district court below followed the statutory provisions regarding referrals, reports and recommendations to the letter. Accordingly, to the extent that Davenport claims that the process followed was deficient, there is no reason to grant certiorari on that basis.

In summary, this is a simple case of defective pleading, a conclusion unanimously reached by three different levels of the federal judiciary on three different occasions. The record fails to establish any alleged invasion of Davenport's constitutional rights. Finally, the absence of any one factor traditionally present where certiorari has been granted precludes review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH H. BADAMI
Counsel of Record
CRAIG C. DIRRIM
WOODS & AITKEN
Attorneys for Respondents
Patrick Kenner and
Thayer County Bank
206 South 13th Street
Suite 1500
Lincoln, Nebraska 68508
(402) 474-0321

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2295

Gene Allen Davenport,

Appellant,

v.

Orville L. Coady, District Judge for the State of Nebraska, Thayer County Courthouse; John Does; Arthur P. Burnes, Attorney; Joseph Murray, Attorney; Gary R. Young, Thayer County Sheriff; Nancy C. McLaughlin, Clerk of the District Court; Patrick Kenner, CEO, Thayer County Bank; Lloyd Vancleef, CEO, Citizens State Bank,

Appellees.

Appeal from the United States
District Court for the
District of Nebraska

[UNPUBLISHED]

Submitted: September 3, 1997
Filed: September25, 1997

Before McMILLIAN, FAGG, and LOKEN, Circuit Judges.

Appendix A

PER CURIAM.

Gene Allen Davenport appeals from a final order of the United States District Court[1] for the District of Nebraska, dismissing his complaint with prejudice for failing to comply with Federal Rule of Civil Procedure 8, and denying his motions for summary judgment and for default judgment. We have carefully reviewed the record and affirm on the basis of the district court's opinion. *See* 8th Cir. R. 47B. We deny his motion for judgment against two appellees.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

1. The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, adopting the report and recommendation of the Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED SEPTEMBER 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2295

Gene Allen Davenport,

Appellant,

v.

Orville L. Coady, District Judge for the State of Nebraska, Thayer County Courthouse; John Does; Arthur P. Burnes, Attorney; Joseph Murray, Attorney; Gary R. Young, Thayer County Sheriff; Nancy C. McLaughlin, Clerk of the District Court; Patrick Kenner, CEO, Thayer County Bank; Lloyd Vancleef, CEO, Citizens State Bank,

Appellees.

4: 97-CV-3001

Appeal from the United States
District Court for the
District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

Appendix B

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 25, 1997

A true copy.

ATTEST: s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[stamp]
MANDATE ISSUED
NOV 21 1997

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED JANUARY 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

ORDER

IT IS ORDERED that all motions to dismiss filed by Defendants pertaining to Plaintiff's complaint (filing 9, in addition to similar responsive pleadings or motions not yet received) are referred to Magistrate Judge Piester for disposition or recommendations, as appropriate.

DATED this 16th day of January, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX D — MEMORANDUM, ORDER AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 7, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

v.

ORVILLE L. COADY, et al.,

Defendants.

MEMORANDUM, ORDER AND RECOMMENDATION

Pursuant to District Judge Richard G. Kopf's referral (filing 10) and 28 U.S.C. § 636(b)(1)(A, B), the following motions are before me for resolution: defendants' motions to dismiss (filings 9, 16, 17, 20, and 23); defendants' motion for Rule 11 sanctions (filing 21); defendant's objection to plaintiff's motion for summary judgment (filing 26); plaintiff's motions for summary judgment (filings 19, 24, and 25); plaintiff's motion to deny Defendant Coady's motion to dismiss (filing 11); and plaintiff's motion for default judgment as against Defendants McLaughlin and Young (filing 18). As explained below, I conclude plaintiff's complaint fails to comply with *Fed.R.Civ.P.* 8(a)(2) and thus, recommend it be dismissed.

Appendix D

ALLEGATIONS

Plaintiff has filed a complaint (filing 1) against numerous defendants, including a judge, a law enforcement officer, an elected official, several attorneys, and financial institutions.

Plaintiff's complaint is virtually incomprehensible. It generally consists of statements about the "American Free Flag of Peace," bald allegations of liability on such purported legal theories as "Perjury of Oath," "Duress," "Chilling Effect Doctrine," and "Deprivation of Rights," and is almost completely devoid of any allegations of fact. Plaintiff makes only a cursory attempt to identify the alleged acts and/or omissions on which his complaint purportedly is based. Plaintiff states that there was an agreement to dismiss a case involving Citizens State Bank and that Thayer County Bank filed a cross petition which was allowed by the presiding judge. Plaintiff fails to set forth the alleged conduct attributable to each of the numerous defendants.

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint must contain, *inter alia:*

> (2) a short and plain statement of the claim showing that the [plaintiff] is entitled to relief . . .

Fed.R.Civ.P. 8(a)(2). This short and plain statement must provide "fair notice of the plaintiff's claims and grounds for relief." *Smith v. St. Bernards Real Med. Center*, 19 F.3d 1254, 1255 (8th Cir. 1994). A complaint, however, "that contains merely bare allegations of liability, without pleading facts giving rise to this liability," does not provide the opposing parties with

the "fair notices required by Rule 8. *Askanase v. Fatjo,* 148 F.R.D. 570, 573 (S.D. Tex. 1993) (citations omitted). "Even the liberal notice pleading allowed by the federal rules requires a pleading to include the operative facts upon which the pleader bases his claim." *Id.* (citation omitted).

Here there is nothing in plaintiff's complaint which remotely resembles the requisite "short and plain statement of the claim", much less provides defendants with fair notice of plaintiff's purported grounds for relief. Although a *pro se* complaint is to be liberally construed, *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972), it must contain specific facts supporting its conclusions. *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985). A party's *pro se* status does not immunize such litigant from the requirements of Rule 8. *See Michaelis v. Nebraska State Bar Ass'n,* 566 F. Supp. 89, 92 (D. Neb.), *aff'd,* 717 F.2d 437, 439 (8th Cir. 1983). Thus, plaintiff's wholesale failure to set forth any facts in the complaint in support of his myriad legal claims clearly violates *Fed.R.Civ.P.* 8(a)(2).

Defendants' Motions

Defendants have filed motions to dismiss (filings 9, 16, 17, 20, and 23). In light of plaintiff's plain failure to plead supporting facts, it is axiomatic that the complaint does not state a claim upon which relief may be granted, even under the most liberal of standards. *See Carney v. Houston,* 33 F.3d 893, 894 (8th Cir. 1994) (consideration of motion to dismiss requires the court to construe allegations in the complaint in light must favorable to plaintiff). In fact, the complaint is wholly frivolous as it contains virtually no allegations of any specific facts suggesting the existence of a claim against the defendants. Therefore, I shall recommend defendants' motions to dismiss

the complaint (filings 9, 16, 17, 20, and 23) be granted pursuant to *Fed.R.Civ.P.* 12(b)(6).[1, 2]

Defendant Kenner filed an "Objection to Motion for Summary Judgment . . ." (filing 26) in response to plaintiff's motion for summary judgment against him (filing 24). Such a filing is an improper pleading under the local rules. No 'answer,' or 'opposition,' or 'response' to a motion, or any similarly titled 'pleading' in opposition to a motion shall be filed, delivered or served. NELR 7.1(b). An opposing brief is the proper response to defendant's motion to dismiss.[3] NELR 7.1(b). As such, I shall deny plaintiff's objection (filing 26) because such pleadings do not comply with NELR 7.1(b).

---

1. It should be noted that a motion to dismiss pursuant to *Fed.R.Civ.P.* 12(b)(6) is an appropriate mechanism to challenge "the form and sufficiency of a statement of a claim under Rule 8(a) (2) . . ." 5 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedures* § 1203 (2d ed. 1990). *See also Bard v. Crockett*, 1990 WL 509739, *1 (W.D. Mo. 1990) (explaining that "critical issue" in considering Rule 12(b)(6) motion is the sufficiency of the complaint as governed by Rule 8(a)), *aff'd*, 938 F.2d 185 (8th Cir. 1991), *cert. denied*, 502 U.S. 900 (1991).

2. Plaintiff's complaint appears to be similar to others recently filed in this court which contain identical allegations against other defendants. Filing meritless complaints which are groundless is abusive of this court and its process, for such complaints deprive the court of its resources, which should be used to resolve citizens' legitimate disputes. Plaintiff is advised that future complaints which fail to raise legitimate claims may cause the imposition of sanctions against him, monetary and otherwise. *See Fed.R.Civ.P.* 11.

3. Plaintiff has submitted a brief in support of his motion which I shall construe as a brief in opposition to defendants motion to dismiss.

Appendix D

Defendants Young and McLaughlin filed a "Motion for Rule 11 Sanctions" as well as a brief and index of evidence in support of the motion asking the court to impose appropriate sanctions against the Plaintiff for filing a Motion for Default Judgment in this proceeding." (Filing 21). Defendants Young and McLaughlin have failed to allege that they have followed the provisions of *Fed.R.Civ.P.* 11(c)(1). Specifically, Defendants Young and McLaughlin have failed to show that they waited 21 days after service of the motion on plaintiff to allow him to withdraw his motion for default judgment *before* filing their motion with the court. *Fed.R.Civ.P.* 11(c)(1)(A). In fact the only indication of service upon the plaintiff is the certificate of service accompanying the filed motion which indicates that a copy of the motion was mailed to plaintiff on the same day that it was filed. Therefore, I shall recommend that Defendants Young and McLaughlin's "Motion for Rule 11 sanctions" (filing 21) be denied.

Plaintiff's Motions

Plaintiff also has outstanding motions before the court. Plaintiff has filed motions for summary judgment (filings 19, 24, and 25) against Defendants Coady, Murray, Van Cleef, Kenner, and Burnes. Plaintiff has not even attempted to comply with the local rules pertaining to such motions, *See* NELR 7.1(a)(2) and 56.1(a), much less demonstrated that there exists no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Rather, plaintiff's supporting materials consist entirely of "Affidavit[s] of Amount Due" and "Brief[s] in Support of Motion for Summary Judgments, which in turn consist of nothing more than unsupported legal conclusions and numerous attachments of unknown and unexplained origin. Based on the obviously premature nature

of plaintiff's motion, the woefully inadequate nature of his supporting materials, and his flagrant disregard of the procedures governing summary judgment as set forth in the Federal Rules of Civil Procedure and the local rules of this court, I shall recommend plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied.

Plaintiff has filed a "Motion to Deny" Defendant Coady's motion to dismiss (filing 11). I shall deny plaintiff's "Motion to Deny" because, first, plaintiff's complaint does not conform to Rule 8, as explained above, and, second, such motions do not comply with NELR 7.1(b).

Plaintiff also has filed a Motion for Default Judgment" (filing 18) against Defendants Nancy C. McLaughlin and Gary Young. The issuance of default judgments are not favored by the law and are generally granted for willful violations of court rules or intentional delays. *See United States ex rel. Time Equipment Rental U Sales. Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *In re Jones Truck Lines. Inc.*, 63 F.2d 685, 688 (8th Cir. 1995). According to my calculations the deadline for responding to plaintiff's complaint with respect to Defendant McLaughlin was January 27, 1997.[4] The court record reveals that Defendants McLaughlin and Young's motion to dismiss (filing 17) was filed on February 3, 1997, five business days late and on the same day as the plaintiff's motion for default judgment (filing 18). There is no indication that Defendant

---

4. The copy of the return receipt signed by Defendant McLaughlin filed with the summons on January 13, 1997 shows a delivery date of January 7, 1997. The date of service on Defendant Young is unclear. Plaintiff has filed a copy of the envelope sent certified mail, postmarked January 6, 1997 which was returned, refused.

McLaughlin and Young's failure to timely file a response was due to intentional delay. Therefore, I shall deny plaintiff's "Motion for Default Judgment" (filing 18).

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff's motion for default judgment (filing 18) is denied.

2. Plaintiff's "Motion to Deny" (filing 11) is denied.

3. Defendant Kenner's "Objection to Motion for Summary Judgment by Defendant Patrick Kenner" (filing 26) is denied.

FURTHER, IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, pursuant to 28 U.S.C. § 636(b), as follows:

1. That defendants' motions to dismiss for failure to state a claim (filings 9, 16, 17, 20, and 23) be granted;

2. That Defendants Young and McLaughlin's motion for Rule 11 sanctions (filing 21) be denied;

3. That plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied; and

4. That plaintiff's complaint (filing 1) be dismissed as to all defendants.

Plaintiff is hereby notified that unless objection is made within ten days after being served with a copy of this recommendation, plaintiff may be held to have waived any right to appeal the court's order adopting this recommendation.

Appendix D

Dated April 7, 1997.

BY THE COURT

s/ David L. Piester
United States Magistrate Judge

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on the Magistrate Judge's Memorandum, Order and Recommendation (filing 27) and the objection to such Memorandum, Order and Recommendation (filing 28), filed as allowed by 28 U.S.C. § 636(b)(1)(C) and NELR 72.4.

I have conducted, pursuant to 28 U.S.C. § 636(b)(1) and NELR 72.4, a de novo review of the portions of the Recommendation to which objections have been made. Inasmuch as Judge Piester has fully, carefully, and correctly applied the law, I need only state that Judge Piester's Recommendation should be adopted.

IT IS ORDERED:

Appendix E

1. The Magistrate Judge's Memorandum, Order and Recommendation (filing 27) is adopted;

2. The objections of the plaintiff (filing 28) are denied;

3. The defendants' motions to dismiss (filings 9, 16, 17, 20, 23) are granted;

4. The motion for Rule 11 sanctions filed by defendants Young and McLaughlin (filing 21) is denied;

5. The plaintiff's motions for summary judgment (filings 19, 24, 25) are denied as moot, as the defendants have been dismissed from this action pursuant to paragraph (3), above; and

6. Plaintiff's complaint is dismissed, and judgment shall be entered by separate document.

DATED this 29th day of April, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

JUDGMENT

Pursuant to the court's Memorandum and Order previously filed in this matter, final judgment is entered in favor of the defendants and against the plaintiff, providing that the plaintiff shall take nothing as against the defendants and the plaintiff's complaint is dismissed with prejudice.

DATED this 29th day of April, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX G — COMPLAINT DATED JANUARY 6, 1997

Gene Allen, Davenport
General Delivery
Belvidire, Nebraska 68315
402-768-6429
Private Citizen

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Gene Allen, Davenport, General Delivery, Belvidire, Nebraska 68315, Private Citizen

Plaintiff

VS.

ORVILLE L. COADY, DISTRICT JUDGE FOR THE STATE OF NEBRASKA, THAYER COUNTY COURTHOUSE, P.O. BOX 297, HEBRON, NEBRASKA 68370, Et. al.

Defendants

"Complaint"

NOTICE: No review of this Complaint by the Court pursuant to NELR 3.4 will be allowed. (Ref. Hake v. Clarke No. 95-1960 United states Court of Appeals, Eighth Circuit).

This Case is under the Jurisdiction of the American Free Flag of Peace TITLE 4 U.S.C. 1 of the United states of America. No Admiralty or Maritime Jurisdiction will be allowed in the Jurisdiction of the . . .

Appendix G

Case No._____

Suing Damages $4,600,000.00

Incorporated Case No. 13845

See attached sheet of Defendants

Plaintiff requests a 7th A.U.S.C. Jury Trial in Lincoln

Appendix G

Attached sheet of Defendants

Defendant Attorney(s)

ARTHUR P. BURNES,
ATTORNEY
CONTINENTAL BUILDING
209 SOUTH 19TH STREET,
SUITE 500
OMAHA, NEBRASKA 68102-1712

JOSEPH MURRAY,
ATTORNEY
P.O. BOX 87
HEBRON, NEBRASKA 68370

Defendant Law Enforcement Officer(s)

GARY YOUNG
THAYER COUNTY SHERIFF
324 OLIVE
HEBRON, NEBRASKA 68370

Defendant Elected Official(s)

NANCY C. McLAUGHLIN
CLERK OF THE DISTRICT COURT
P.O. BOX 297
HEBRON, NEBRASKA 68370

Defendant Financial Institution(s)

PATRICK KENNER, CEO
THAYER COUNTY BANK
P.O. BOX 109
HEBRON, NEBRASKA
68370
AND ALL OTHERS

LLOYD VANCLEEF, CEO
CITIZENS STATE BANK
P.O. BOX 135
CARLETON, NEBRASKA
68326
AND ALL OTHERS

Et. al.

All Doe's 1 to 99

Appendix G

Plaintiff Affirms to tell the truth, and has
first hand knowledge of the facts.

s/ Gene Allen, Davenport
Gene Allen, Davenport, Private Citizen

Abbreviations:

F.R.C.P.=Federal Rules of Civil Procedure
U.S.C.=United states Codes
A.U.S.C.=Amendment United states Constitution
U.C.C .=Uniform Commercial Code

Person is replaced with Private Citizen in Stats Definition

FACTS

1. The District Court shall have original Jurisdiction of all Civil Actions arising under the Constitution, Law, or Treaties of the United states. TITLE 28 U.S.C. 1331

2. Under TITLE 28 U.S.C. 1343, the District Court shall have original Jurisdiction of any Civil Action authorized by Law to be commenced by any Private Citizen.

3. The Jurisdiction of the American Free Flag is the determining factor under which all Private Citizens' Rights are secured.

> This Flag is described as red, white, and blue, with a star to represent each state of the Union, on a field of blue, and stripes of red and white horizontally placed in alternation.

Appendix G

4. Because the Court did not join with the Jurisdiction of the American Free Flag of Peace, TITLE 4 U.S.C. 1, the Court lacked Jurisdiction over the Private Citizen.

5. Incorporated Case No. 13845 was agreed to be dismissed by Plaintiff, Citizen State Bank as of 10:30 A. M. on May 20, 1996.

6. Thayer County Bank filed a Cross Petition into Closed Case No. 13845, on May 22, 1996.

7. The Judge proceeded with the Cross Petition, knowing that Case had been Res Judicata before Cross Petition was filed, as per Judges admission in Court on June 24, 1996.

8. The Judge knew that the Constitutional Laws of the United states of America were correct, but acted against the Private Citizen(s), pursuant to, TITLE 18 U.S.C. 1621.

9. Attorneys are guilty of "Legal Malpractice", when they fail to use the skill, prudence, and diligence, Lawyers of ordinary skill and capacity, commonly possess and exercise in performance of tasks, undertaken. When failure proximately causes damage, this gives rise to an action in "tort". Rep Neel v Magana, Olney, Levy, Cathcart and Gelfand 6 Cal. 3d 176, 98. Cal. Rptr. 837, 838, 491, P. 2d. 421.

10. All Defendants are incorporated into this Case, pursuant to TITLE 28 U.S.C. 1343, for Knowledge of the Law, Negligence of the Law, and failure to stop and correct the wrongs against Plaintiff(s).

11. The Plaintiffs GOD Given Rights, Constitutional Rights, and Immunities secured by the Constitution of the United states

of America, in Amendments I, IV, V, VII, IX, and X were violated by the Defendants.

12. The Law states in TITLE 18 Chapter 79 U. S. C. A. Sec. 1621 (WEST 1994) Page 554 Par. 2d sec. (a):

> State pays all fees when Judge and Lawyers in concert violate "Oaths of Office", and cause "Perjury of Oath". Citizens can not be made to pay fees to have their U. S. Constitutional Rights violated."

13. The right to a trial by jury was not preserved as required by Amendment VII of the Constitution of the United states of America.

14. The 7th Amendment states: the right to a Common Law Court shall be preserved, and describes Jurisdiction of the Court by the American Free Flag of Peace, 4 U.S.C. 1.

15. Under the Jurisdiction of the American Free Flag of Peace, the United states Constitution is alive and well, and all rights are preserved. Private Citizen(s) are innocent until proven guilty.

16. The Law Enforcement Officer(s) swore an Oath to defend and protect the Private Citizens of this state, and for "Lack of Care", violated that Oath. Law Enforcement Officer(s) were enriched (got wages) for their actions in violating a Private Citizen's Rights.

17. A Private Citizen is entitled, under TITLE 28 U. S. C. 1343 (a) (2), "To recover damages from any Private Citizen, who fails to prevent, or to aid in preventing any wrongs mentioned in Section 1985 of TITLE 42, which he had knowledge were about to occur, and the power to prevent".

Appendix G

18. Plaintiff(s) is filing under Perjury of Oath, TITLE 18 Chapter 79 U. S. C. 1621, and for nonjoinder with the American Free Flag of Peace, TITLE 4 U. S. C. 1621.

19. Plaintiff(s) is accusing the Defendant Judge(s), with all of the following charges:

Count I---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

Count II---------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

Count III---------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

Count IV---------- "Deprivation of Rights"; Section 1985 of TITLE 42

Count V---------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

20. Plaintiff(s) accusing all Defendant Attorney(s), with all of the following charges:

Count I---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

Count II---------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

Count III-------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

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Count IV-------- "Deprivation of Rights"; Section 1985 of TITLE 42

Count V--------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

Count VI-------- "Conspiracy"; TITLE 18 U. S. C. 241

Count VII------- "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

Count VIII------ "Malpractice", Professional Misconduct or Unreasonable Lack of Skill; Rep. Matthews v. Walker, 34 Ohio App. 2d 128, 296 N.E. 2d 569, 571. 63 0.0. 2d 208.

21. Plaintiff(s) is accusing all of the Defendant Law Enforcement Of ficer(s), with all of the following charges:

COUNT I-------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

COUNT II------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT III------ "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

COUNT IV------- "Deprivation of Rights"; Section 1985 of TITLE 42

COUNT V--------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

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COUNT VI------- "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

22. Plaintiff(s) is accusing all of the Defendant Elected Official(s), with all of the following charges:

COUNT 1---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

COUNT II-------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT III------ "Deprivation of Rights"; Section 1985 of TITLE 42

23. Plaintiff(s) is accusing all of the Defendant Financial Institution(s), with all of the following charges:

COUNT I-------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT II------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

COUNT III------- "Deprivation of Rights"; Section 1985 of TITLE 42

COUNT IV------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

COUNT V------- "Conspiracy"; TITLE 18 U. S. C. 241

COUNT VI------ "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

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COUNT VII----- "Larceny by Fraud or Deception"; Model Penal Code, 223.3

COUNT VIII---- "Extortion"; Ref. 18 U. S. C. A. 871 et seq., 1951.

24. Damages in a claim, for violation of United states Constitutionally guaranteed Rights are recovered. Damages may be presumed, and damages may in circumstances, support award of the damages, Tracy v Robbins, D. C. S. C. 1966, 40 Fed.

25. Violation of Policy and Custom, come under intent of deprivation of Rights, under TITLE 18 U. S. C. A. 242 "Deprivation of Rights, under Color of Law, as against the Private Citizen.

"Prayer"

26. Plaintiff(s) Prays to the Court for relief in the amount of $100,000.00 (One Hundred Thousand Dollars) in damages for each charge specified in each category, for each Defendant listed under that category.

CONCLUSION

27. Plaintiff(s) has been hurt financially, suffered mental anguish, and physical hardship, because of acts committed by Defendants. The Court at Law, failed to examine the Law, and the United states Constitutional Rights of the "Cases of Incorporation", and advise, or represent the Plaintiff(s), as to the validity of stated Civil Rights and United states Constitutional Laws.

Appendix G

28. The Court knew, that the Constitutional Laws were valid, Pursuant to TITLE 18 U. S. C. 1621. Judges and Attorneys should have practiced Law with skill, care, and diligence in examination of "Cases of Incorporation", and the Judges should have discovered the defects. The Judges and Attorneys are guilty of want of care, skill, and diligence in the examination of Plaintiff's Rights, and in advising Plaintiff (s) in "Cases of Incorporation". Plaintiff (s) was misled, as to the facts stated in Court, and shown to Plaintiff (s) and members of "Cases of Incorporation".

29. Elected Officials operating under Color of Statute, Ordinance, Regulation, Custom, or Usage of a state or Territory, subjected, or caused to be subjected, a Private Citizen of the United states of America, or under the Jurisdiction thereof, to Deprivation of Rights, Privileges, or Immunities secured by the United states Constitution. .

s/ Gene Allen, Davenport Date January 6, 1997

Gene Allen, Davenport
General Delivery
Belvidere, Nebraska 68315
402-768-6429
Private Citizen

APPENDIX H — MOTION FOR DENIAL OF RECOMMENDATIONS AND ORDERS OF MAGISTRATE PIESTER DATED APRIL 21, 1997

Gene Allen, Davenport
% General Delivery
Belvidere, Nebraska 68315-9999
402-768-6429
Private Citizen

In the district court of the united States
for the district of Nebraska

4:CV 97-3001

Gene Allen, Davenport, % General Delivery, Belvidere, Nebraska 68315-9999, Private Citizen

Plaintiff

VS.

ORVILLE L. COADY, DISTRICT JUDGE FOR THE STATE OF NEBRASKA, THAYER COUNTY COURTHOUSE, P.O. BOX 297, HEBRON, NEBRASKA 68370, Et. al.

Defendants

"MOTION FOR DENIAL OF RECOMMENDATIONS AND ORDERS OF MAGISTRATE JUDGE PIESTER"

Pursuant to "Memorandum, Order and Recommendation" dated April 7, 1997, the Plaintiff, Gene Allen: Davenport, denies the Allegations made by Magistrate Judge, David L. Piester. Plaintiff requests the Honorable Judge Richard G. Kopf to Deny

Appendix H

the Memorandum, Orders and Recommendation made by Magistrate Judge, David L. Piester.

s/ Gene Allen: Davenport Dated: 4-17-97
Gene Allen, Davenport
% General Delivery
Belvidere, Nebraska 68315-9999
402-768-6429
Private Citizen

Supreme Court, U.S.
FILED
APR 10 1998
OFFICE OF THE CLERK

No. 97-1495

In The

Supreme Court of the United States

October Term, 1997

GENE ALLEN: DAVENPORT,

Petitioner,

v.

ORVILLE L. COADY, ARTHUR P. BARNES, PATRICK KENNER, NANCY MCLAUGHLIN, JOSEPH MURRAY, LLOYD VANCLEEF, GARY R. YOUNG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, NANCY C. MCLAUGHLIN AND GARY R. YOUNG

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Attorneys for Respondents, on behalf of Gary R. Young and Nancy McLaughlin

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15 pp

QUESTION PRESENTED FOR REVIEW

Whether dismissal of Petitioner's complaint by the United States District Court for the District of Nebraska, and subsequent affirmance by the United States Court of Appeals for the Eighth Circuit, violated Petitioner's rights so as to warrant granting of Petition for Writ of Certiorari to the United States Supreme Court?

LIST PURSUANT TO RULE 24.1(b)

The following are all parties to the proceeding in the court whose judgment is under review.

Gene Allen: Davenport
Orville L. Coady
Arthur P. Barnes
Patrick Kenner
Nancy McLaughlin
Joseph Murray
Gary R. Young

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BRIEF IN OPPOSITION

Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied

STATEMENT

Petitioner filed a complaint against seven individuals in the United States District Court for the District of Nebraska. Petitioner alleged that Respondents had violated his constitutional rights, had conspired to violate those rights, had failed to prevent said violations and, as to the Respondents who practice law, had committed malpractice.

The complaint was comprised solely of conclusory statements. The Petitioner did not state the specific rights which Respondents allegedly violated; nor did he allege any facts demonstrating or supporting the purported violations. Excerpts from the complaint follow:

> 8. The Judge knew that the Constitutional Laws of the United states[sic] of America were correct, but acted against the Private Citizen(s), pursuant to, TITLE 18 U.S.C. 1621.
>
> 9. Attorneys are guilty of "Legal Malpractice", when they fail to use the skill, prudence, and diligence, Lawyers of ordinary skill and capacity, commonly possess and exercise in performance of tasks, undertaken. When failure proximately causes damage, this gives use to an action in "tort". *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6

> Cal.3d 176, 98 Cal. Rptr. 837, 838, 491 P.2d 421.
>
> 11. The Plaintiff's GOD Given Rights, Constitutional Rights, and Immunities secured by the Constitution of the United states[sic] of America, in Amendments I, IV, V, VII, IX, and X were violated by the Defendants.

Petitioner's complaint concluded with a list of the alleged violations against the respective Respondents. Those allegations were presented in the following manner:

> 19. Plaintiff(s) is accusing the Defendant Judge(s), with all of the following charges:
>
> Count I . . . "Perjury of Oath"; TITLE 18 Chapter 79 U.S.C. 1621
>
> Count II . . . "Duress"; Head v. Gadsden Civil Serv. Bd., Ala.Civ.App., 389 So.2d 516, 519
>
> Count III . . . "Chilling Effect Doctrine", North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).
>
> Count IV . . . "Deprivation of Rights", Section 1985 of TITLE 42
>
> Count V . . . "Constitutional Tort", TITLE 42 U.S.C. Sec. 1983

Now, for the first time, Petitioner sets forth facts in his Petition for Writ of Certiorari in an effort to support the conclusions he reached in his complaint. Petitioner did not make any of these facts available to the district court, appellate courts or the parties at any time prior to filing his Petition herein.

Numerous motions followed the filing of the Petitioner's complaint. All Respondents filed motions to dismiss the complaint for failing to state a claim upon which relief could be granted. The Petitioner filed motions for summary judgment, a motion to deny Respondent Coady's motion to dismiss and a motion for default judgment as against Respondents McLaughlin and Young. Respondents filed responses in opposition to Petitioner's motion for summary judgment.

United States District Judge Richard G. Kopf referred the complaint and the various motions to a magistrate judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). In accord with that rule, United States Magistrate Judge David L. Piester reviewed all pleadings and prepared a Memorandum, Order and Recommendation as allowed by 28 U.S.C. § 636(b)(1)(C) and Rule 72.4 of the Local Rules of the United States District Court for the District of Nebraska.

Judge Piester found that the "[p]laintiff fails to set forth the alleged conduct attributable to each of the numerous defendants." He then set forth the requirements of Federal Rule of Civil Procedure 8 regarding the contents of a complaint and demonstrated how Petitioner failed to meet those requirements. After admonishing the Petitioner for filing a complaint containing allegations identical to those which he had previously filed against different defendants, Judge Piester concluded the Memorandum with a recommendation to Judge Kopf that Petitioner's complaint be dismissed for failure to state a cause of action, that the motion for sanctions be denied, and that Petitioner's motion for summary judgment be denied as moot.

Petitioner filed an objection to the magistrate's Memorandum, Order and Recommendation ("Recommendation"). United States District Judge Kopf conducted a de novo review of the portions of the Recommendation to which Petitioner objected and issued his own Memorandum and Order ("Order") which found that Judge Piester's Recommendation "fully, carefully and correctly applied the law." Judge Kopf's Order adopted Judge Piester's Recommendation which, *inter alia*, dismissed Petitioner's complaint with prejudice.

Petitioner filed an appeal of that Order with the United States Court of Appeals for the Eighth Circuit. Petitioner's appellate brief contained conclusory allegations similar to those set forth in his original complaint. The Eighth Circuit summarily affirmed the District Court's dismissal of Petitioner's complaint with prejudice for failing to comply with Federal Rule of Civil Procedure 8.

ARGUMENT

I. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI WHERE, AS HERE, NO CONFLICT AMONG THE COURTS OF APPEALS EXISTS AND THE PETITIONER'S CASE DOES NOT INVOLVE ISSUES OF GRAVE IMPORTANCE TO THE PUBLIC INTEREST.

Jurisdiction to review decisions of the courts of appeals is to be used sparingly and primarily for two purposes. *Ex parte Lau Ow Bew*, 141 U.S. 583 (1891); *In re Woods*, 143 U.S. 202 (1892); *Lau Ow Bew v. United States*,

144 U.S. 47 (1892); *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372 (1893); *Forsyth v. City of Hammond*, 166 U.S. 506 (1897); *Fields v. United States*, 205 U.S. 292 (1907); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916); *Ohio ex rel. Seney v. Swift & Co.*, 260 U.S. 146 (1922). First, the United States Supreme Court has reviewed cases by writs of certiorari from Circuit Courts of Appeals to secure uniformity of decision when a conflict exists among courts. *Id.*, *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

For example, in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), the Court of Appeals for the Third Circuit acknowledged that the Fifth Circuit's position on a discovery issue "appears to be to the contrary, but we find ourselves in disagreement with that case". Another example of a case which falls under this category is *United States v. Lorenzetti*, 467 U.S. 167 (1984). The Supreme Court granted certiorari in *Lorenzetti* to review an opinion of the Court of Appeals for the Third Circuit which recognized that its interpretation of a statute was "squarely inconsistent" with that of the Sixth Circuit. *Id.* *See also, e.g., City of New York v. Saper*, 336 U.S. 328, 328 (1949) (conflict related to an issue "of importance in the administration of the Bankruptcy Act."); *United Bhd. of Carpenters and Joiners v. United States*, 330 U.S. 395, 400 (1947) ("conflict involves an important question of statutory construction"); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of "the need for a uniform rule on the point"); *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 507 (1982) (certiorari granted because matter involved "a question of

importance not heretofore considered by this Court, and one over which the Circuits are divided").

This Court has also granted certiorari when a decision of a court of appeals appears to be in conflict with Supreme Court precedent. Such a conflict usually arises through a misinterpretation or misapplication of the precedent. *United States v. Doe*, 465 U.S. 605, 610 (1984); *Lugor v. Edmondson Oil Co.*, 457 U.S. 922, 926 (1982); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982). The instant petition presents no such conflict among courts. Hence, a grant of certiorari on that basis is unwarranted.

The second category of cases in which this Court has granted certiorari involves issues of grave importance to the public interest which would benefit the public interest to have the Court of last resort decide. *Id.* Such cases for which certiorari was granted include those involving important constitutional issues. For example, this Court granted certiorari "to review the exercise of the grave power of annulling an Act of Congress," *United States v. Gainey*, 380 U.S. 63, 65 (1965), and to review the invalidation of a state statute under the federal Constitution because "this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico." *New York v. O'Neill*, 359 U.S. 1, 3 (1959). Other cases which this Court deemed "gravely important" encompassed issues such as the irreconcilability of certain convictions regarding demonstration and assembly rights with the Fourteenth Amendment of the United States Constitution, *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963), the applicability of the Confrontation Clause of the Sixth Amendment to the states, *United States v. Gouveia*, 467 U.S. 180 (1984), and

the constitutionality of a California statute relating to due process because the issues presented were found to be important "not only to California but to other States which have similar laws." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957).

The Supreme Court has also granted certiorari in cases which involve important federal statutory issues. *See, e.g., American Fed'n. of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (question presented is "an important one of first impression" under the statute); *Laing v. United States*, 423 U.S. 161, 167 (1976) (resolutions of a tax law conflict would affect seventy cases pending in federal courts); *United States v. Donovan*, 429 U.S. 413, 422 (1977) (question presented involved "construction of a major federal statute"). Other issues which have satisfied the standard of "grave importance" involve significant jurisdictional and procedural issues. *See, e.g., Bruner v. United States*, 343 U.S. 112 (1952) (involving jurisdiction of federal district courts); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (involving the jurisdictional amount in class action suits); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 255 (1946) (involving the proper establishment of federal jury panels).

The questions which Petitioner herein seeks to present for review include whether the Nebraska District Court Judge violated the Federal Rules of Civil Procedure, Rule 38(a) and whether the particular judges of the United States appellate and district courts are "required to follow their Oaths to uphold the Constitution?" Notwithstanding the rhetorical nature of the latter question, without a factual basis whatsoever to support

such claims, Petitioner's questions involve neither a conflict between the courts of the land nor any issue worthy of consideration by this Court through a grant of certiorari.

CONCLUSION

The issues which Petitioner presents for review do not involve a conflict between the courts of appeals or a matter of grave importance to the public interest. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

SCOTT E. DANIEL*
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800 Farnam Plaza
1623 Farnam Street
Omaha, Nebraska 68102-2106
Tel. No. (402) 348-1000
Attorneys for Respondents, on behalf of Gary R. Young and Nancy McLaughlin

* *Counsel of Record*

(A)

No. 97-1495

Supreme Court, U.S.
FILED
APR 24 1998
CLERK

In the
Supreme Court of the United States
October Term 1997

Gene Allen: Davenport - Petitioner

VS.

ORVILLE L. COADY - Respondent
Et. al

On Petition For Writ of Certiorari
To The Court Of Appeals
For The Eighth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Gene Allen: Davenport, Pro se

Gene Allen: Davenport
general delivery
Belvidere [68315]
Nebraska U.S.A.
402-768-6429

15

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals depart from the Federal Rules of Civil Procedure, Rule 56 (e) by upholding the Decision of the District Court to deny the Petitioner's Motion for Summary Judgment against Patrick Kenner and Thayer County Bank, when the Motion for Summary Judgment was supported by evidentiary exhibits.

II. Can a District Court Judge rule administratively in a case without a hearing, or without giving Petitioner a Trial by Jury as demanded, and in violation of the Federal Rules of Civil Procedure, Rule 38 (a)?

III. Are the Judges of the Court of Appeals, and District Courts required to follow the Federal Rules of Civil Procedure, the same as Petitioner is?

IV. Whether Patrick Kenner, Thayer County Bank, or the Attorney, Joseph Badami, who represents them, should be allowed any standing before the Supreme Court?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court are as follows:

JOSEPH H. BADAMI
MICHAEL B. LUSTGARTEN
GREGORY C. DAMMAN
SCOTT DANIELS
CHARLES EDWARD LOWE
Patrick Kenner
Orville L. Coady
Albert P. Burnes
Joseph H.Murray
Gary Young
Nancy C.McLaughlin
Lloyd VanCleef

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I.
The Supreme Court should grant Certiorari to re-affirm that the Judges of the Court of Appeals, and District Courts are required to follow the Federal Rules of Civil and Judicial Procedure, and their Oaths of Office.

II.
The Supreme Court should grant Certiorari, as this case is of Primary importance to every private citizen of the individual States of the united States of America, who is concerned about the abuses and usurping of authority by our Judges, Attorneys, and Law Enforcement Officers, on a daily basis.

III.
The Supreme Court should not accept the Brief in Opposition of Patrick Kenner, Thayer County Bank, which was prepared by the Attorney,Joseph Badami, who represents them, because of the fact that they, or their agent, did not send any copies of the Brief in Opposition to the Petitioner as stated in the Affidavit of Service.

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Petitioner Gene Allen: Davenport's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter should be granted as it involves very basic Principles of Procedure and Constitutional Law which are of grave concern to the country as a whole.

STATEMENT OF THE CASE

A Writ of Certiorari was filed with the Supreme Court of the United States of America on November 14, 1997, was returned for correction on January 15, 1998, because it was done in the wrong form. Petitioner was given sixty (60) days to put the Writ in proper form.

The corrected Writ of Certiorari was placed on the Docket of the Supreme Court on March 12, 1998.

The NebraskaAssistant Attorney General,Charles E. Lowe, filed a Waiver for Respondent Orville L. Coady on March 20, 1998.

Michael B. Lustgarten, attorney for Respondent Albert P. Burnes, filed a Waiver on March 25, 1998.

Joseph Badami, counsel of record for Patrick Kenner and Thayer County Bank, filed a Brief in Opposition with the Supreme Court on April 8, 1998.

STATEMENT OF ISSUES PRESENTED BY RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK

In the Brief in Opposition of Respondents, Patrick Kenner and Thayer County Bank, the brief, in the Questions presented for review, asks the question:

Whether the referral of Respondents Motion to dismiss to a Magistrate Judge for a report and recommendation, pursuant to Title 28 U.S.C. § 636 (b) (1) (B), violated Petitioner's constitutional rights.

Respondent states in the Brief in Opposition that: "On January 6, 1997, Petitioner, Gene Allen Davenport ("Davenport") filed a "Complaint" in the United States District Court for the District of Nebraska against a Nebraska district court judge, two attorneys, a county sheriff, the clerk of the district court, two Nebraska banks, and the banks' respective chief operating officers. (App. G. infra, 17a-27a). The "Complaint" contained a mish-mash of allegations, accusations, and incorrect and misplaced citations of legal principles. Davenport accused Patrick Kenner and Thayer County Bank.....".

"All of the defendants named in the "Complaint." including Respondents, Thayer County Bank and its chief executive officer, Patrick Kenner [collectively "Thayer County"], eventually moved to dismiss the "Complaint" for failure to state a claim. The motions to dismiss were referred to United States Magistrate David L. Piester for a report and recommendation by United States District Judge Richard G. Kopf pursuant to Title 28 U.S.C. 636 (b) (1) (A) and (B). (App. C, infra, 5a)."

The Respondents state that no compelling reasons why certiorari would be appropriate in this case has been stated by the Petitioner.

Instead, Davenport simply alleges that he was deprived of his "constitutional rights," apparently by the referral of Davenport's motions to dismiss to a magistrate judge for a report and recommendation pursuant to Title 28 U.S.C. § 636.

However, there are many extraneous and unrelated matters, misstatements, and irrelevant contentions set forth in Davenport's petition and appendix, matters that do not appear in the record. The district court in this matter had the statutory authority under Title 28 U.S.C. § 636(b) to refer the motions to dismiss to a magistrate judge for a report and recommendation

ARGUMENT

Supreme Court Rule 10 provides that a petition for Writ of Certiorari will be granted "only for compelling reasons." Supreme Court Rule 10 identifies the following criteria, which indicate the character of the reasons the Court considers in determining whether certiorari is appropriate;

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or **has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (Emphasis added)**

(b) **********

(C) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or **has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Emphasis added)**

Supreme Court, Rule 10, concludes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or for misapplication of a properly stated rule of law."

Thus, Rule 10 sets forth the parameters of when and under what circumstances this Court will consider favorably a petition for writ of certiorari.

The Complaint complied with F.R.C.P 8 (a) (2), by stating a "short and plain statement of the claim, showing that the pleader is entitled to relief". In very short and definitive terms, the Complaint stated

that Plaintiff's GOD Given, and Constitutional Rights had been violated by each Defendant.

Evidence in support of the Complaint was attached to the Motion for Summary Judgment as exhibits as required by Federal Rules of Civil and Judicial Procedure, Rule 56 (e).

I. The Supreme Court should grant Certiorari to re-affirm that the Judges of the Court of Appeals, and District Courts are required to follow the Federal Rules of Civil and Judicial Procedure, and their Oaths of Office.

The Petitioner demanded a Seventh Amendment Trial by Jury, on the front page of the Original Complaint, and this Seventh Amendment Right was denied by the District Court, in violation of the Federal Rules of Civil Procedure, Rule 38 (a).

If Federal Rules of Civil Procedure had been followed by the courts, Petitioner would have received his "day in court", and this whole case could have been resolved by now.

In the Interest of Justice, Petitioner calls to the Court's attention, F.R.C.P. 7 (c) which states: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used".

II. The Supreme Court should grant Certiorari, as this case is of Primary importance to every citizen of the individual States of the United States of America, who is concerned about the abuses and usurping of authority by our "justice system"on a daily basis.

The private citizens, and citizens in general have been denied Due Process of Law at every turn, and the Judges have failed to uphold the Constitution or their Oaths. These actions by the Courts have caused great hardships on the people in general. If private citizens are not allowed equal access to the courts, and the right to counsel of their choice (not always required to be represented by an

attorney who has no oath to the Constitution), our forefathers will surely turn over in their graves. This is not just a concern of Petitioner, but of grave concern to thousands of Americans across this great country.

The Respondents Patrick Kenner and Thayer County Bank, through their Attorney, Joseph Badami, and his agent certified that a copy of their Brief in Opposition had been mailed to Petitioner, when in fact a copy of the Brief had not. As of April 21, 1998 a copy still had not been received. It was not until Petitioner called the court, that Petitioner found out that a Brief in Opposition had been filed. This is just one more example of the underhanded, deceptive, and blatant actions, by so called "Officers of the court", that the average American Citizen must endure every day. Because of this obvious attempt to deceive the Court, the Attorney of Record for Respondents Patrick Kenner and Thayer County Bank should not, now, be allowed any standing before the Supreme Court.

We all ask the same question, "Where is the Justice?"

CONCLUSION

This case is based on the Principle and Foundation established by the Constitution, and reaffirmed in the case of Marbury vs Madison, and re-established in Hale v. Hinkel, 201U.S. 43

Petitioner believes that the Brief filed by Joseph Badami for Respondents Patrick Kenner and Thayer County Bank is nothing more than an attempt to mislead the Court by making false statements concerning the original action.

This action is not about the Constitutional Rights violations in the district court for the District of Nebraska, but is about the fact that Petitioner's Constitutional Rights were violated in the State Courts, and Petitioner was not given the opportunity to redress those violations in the district court for the District of Nebraska, because of the Court not following the Rules of Procedure.

It appears the attorney is attempting to mislead the Supreme Court into believing that the Respondents Patrick Kenner and Thayer County Bank have been falsely prosecuted and have followed all the rules. The Petitioner never has contended that the assignment of the Motions to Dismiss to the Magistrate Judge violated is Constitutional Rights. What petitioner did contend, was that the Magistrate Judge had no authority to act under Title 28 U. S. C. 636 (A)which states:

"a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, **except a motion (Emphasis added)** for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminaj case, to dismiss or to permit maintenance of a class action, **to dismiss for failure to state a claim upon which relief can be granted, (Emphasis added)** and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.", and that Court was in violation of the Federal Rules of Civil Procedure by the Referral.

The petition for a writ of certiorari should be granted.

I, Gene Allen: Davenport, declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Respectfully submitted this 24 day of April, 1998

Gene Allen: Davenport, Private Citizen

Notary

Subscribed and Sworn to before me this 24 day of April , 1998.

by Corwin Powell.

My commission expires 5-4-98

GENERAL NOTARY-State of Nebraska
CORWIN POWELL
My Comm. Exp. May 4, 1998

EXHIBITS

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997
No. 97-1495

----------x

GENE ALLEN DAVENPORT,
Petitioners.

Vs.

ORVILLE L. COADY, Et al.,
Respondents.

----------x

STATE OF NEW YORK
COUNTY OF NEW YORK

I, /s/_____,being duly sworn according, to law and beingover the age of 18, upon my oath depose and say that:

I am retained by Woods & Aitken attorneys for respondents.

That on the 8th day of April, 1998, I served the within Brief in Opposition for Respondents Patrick Kenner and Thayer County Bank in the above captioned matter upon:

Gene Allen Davenport
General Delivery
Belvidere, NE 68135
Petitioner, Pro Se
(402) 768-6429

Michael B. Lustgarten
Lustgarten & Roberts
477 Continental Buiding
209 S. 19th Street
Omaha, NE 68102

Attorney for Albert P. Burnes, Respondent
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Gregory C. Damman
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Attorney for Joseph H, Murray & Lloyd Van
Cleaf, Respondents

Craig A, Knickrehm
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Omaha, NE 68502-8220
Attorney for Gary Young and Nancy C.
McLaughlin Respondent

Charles E. Lowe
Assistant Attorney General
2 1 1 5 State Capitol
Lincoln, NE 68509
Attorney for Orville L. Coady, Respondent

by depositing three copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service.

That on the same date as above, I sent to this Court forty copies of Brief in Opposition for Respondents Patrick Kenner and Thayer County Bank through the United States Postal Service by Express Mail, postage prepaid.

All parties required to be served have been served
/s/_____

APR-21-98 10:38 FROM-WOODS AND AITKEN ID:4024745777 PAGE 1/51

Telecopier Transmittal Sheet
WOODS &AITKEN
Attorneys at Law

URGENT

PLEASE DELIVER IMMEDIATELY
Suite 1500
206 South 13th Street
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Date. April 21, 1998
Telecopier: (402) 474-5777
To: Genc Allen Davenport
Firm:
FAX #: (402) 768-6477
From: Craig C. Dirrim
Comments: See attached

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